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Vampires Among Us—Does a Grand Jury Subpoena for Blood Violate the Fourth Amendment?

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Table of Contents

I. Introduction	328
II. The Modern Federal Grand Jury	330
A. <i>Independence of the Grand Jury</i>	331
B. <i>Secrecy of the Grand Jury</i>	333
C. <i>Expansive Power of the Grand Jury</i>	335
III. The Government's Power to Subpoena and the Fourth Amendment	338
IV. The Constitutionality of a Grand Jury Subpoena to Extract Blood	347

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A. DNA Testing	347
B. A Grand Jury Subpoena for Blood is a Search Under the Fourth Amendment	350
C. The Constitutional Reasonableness of a Grand Jury Subpoena for Blood	351
1. Exigent Circumstances	352
2. Reasonable Suspicion	354
3. "Special Needs"	357
4. Balancing Interests	361
D. The Lower Courts' Examination of a Grand Jury Subpoena to Extract Blood	363
E. The Court Should Require a Preliminary Showing of Probable Cause to Support Subpoenas for Blood	371
F. Applying a Showing of Probable Cause to a Grand Jury Subpoena for Blood	379
V. Proposal for Change	379
VI. Conclusion	389
I. Introduction	

The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.¹

In the landmark case of *Schmerber v. California*,² the United States Supreme Court held that the Government conducts a Fourth Amendment search when it compels the extraction and testing of a person's blood.³ Generally, for such a search to be constitutionally permissible, it must be preceded by a warrant based on probable cause.⁴ Faced with exigent circumstances, the Government may forgo the warrant, but it still must have probable cause to undertake such a search.⁵ Occasionally when confronted with "special needs," the Government may demand the extraction and testing of a person's blood if it can show that its interest in so doing

1. *Schmerber v. California*, 384 U.S. 757, 772 (1966).

2. 384 U.S. 757 (1966).

3. *Id.* at 772.

4. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

5. *Schmerber*, 384 U.S. at 770-71.

outweighs the person's interest in privacy.⁶

During the 1980s, the Government acquired a new instrument in the investigation of crime when the analysis of deoxyribonucleic acid (DNA) emerged and gained increased scientific acceptance.⁷ With this technique, the Government can now determine whether a sample of blood from a known person "matches" blood left at the scene of the crime by an unknown offender.⁸ This analysis can also be used to exculpate a suspect.⁹

Once DNA testing gained wider acceptance, the Government realized that it possessed a valuable investigative tool. In order to obtain a sample of blood from a known provider, the Government began to use the subpoena power of the grand jury to demand that suspects appear and undergo extraction of blood for DNA analysis.¹⁰ Individuals, not charged with or even accused of an offense, received subpoenas demanding that they present themselves for withdrawal of such a sample for testing.¹¹

This practice raises serious constitutional issues because the Government does not have to make any preliminary showing before it serves such a subpoena.¹² In order to demand a sample of blood for a grand jury investigation, a prosecutor merely requests a blank subpoena from the court clerk,¹³ fills in the form,¹⁴ and asks a United States Marshal to serve it upon the witness.¹⁵ The subpoena is *presumed* to be reasonable.¹⁶

This Article examines the question of whether using a subpoena in this way violates the Fourth Amendment. It analyzes whether such a subpoena involves a "search" under the Fourth Amendment and if so, whether it is "reasonable." The Article concludes that such a subpoena does involve a search, and that it therefore must be preceded by a showing of probable cause. Because grand jury subpoenas currently do not require such a

6. *Skinner*, 489 U.S. at 619-20.

7. OFFICE OF TECHNOLOGY ASSESSMENT, GENETIC WITNESS: FORENSIC USES OF DNA TESTS 14 (Linda Starke ed., 1990) [hereinafter GENETIC WITNESS]; *People v. Wheeler*, 636 N.E. 2d 1129, 1130-31 (Ill. App Ct. 1994).

8. GENETIC WITNESS, *supra* note 7, at 6.

9. *Id.* at 17.

10. *E.g.*, *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1197 (W.D. Ky. 1993); *Henry v. Ryan*, 775 F. Supp. 247, 249 (N.D. Ill. 1991); *United States v. Infelise*, 773 F. Supp. 93, 95 (N.D. Ill. 1991); *Grand Jury v. Marquez*, 604 N.E.2d 929, 931 (Ill. 1992); *Woolverton v. Grand Jury*, 859 P.2d 1112, 1113 (Okla. Crim. App. 1993).

11. *In re Grand Jury* (T.S.), 816 F. Supp. at 1197; *Henry*, 775 F. Supp. at 249; *Marquez*, 604 N.E.2d at 931; *Woolverton*, 859 P.2d at 1113.

12. FED. R. CRIM. P. 17(a).

13. *Id.*

14. *Id.*

15. FED. R. CRIM. P. 17(d).

16. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

preliminary showing before they are served, the Article maintains that they violate the Fourth Amendment.

Part II of the Article reviews the modern grand jury's investigative function and its power to subpoena witnesses and evidence. Part III discusses the interaction between the Government's power to subpoena and the Fourth Amendment. Part IV addresses the constitutionality of a grand jury subpoena for blood. Part V proposes changes to the Federal Rules of Criminal Procedure regarding the requirements for such subpoenas. The Article concludes that these changes must be made to ensure that a subpoena for blood does not violate the recipient's Fourth Amendment rights.

II. The Modern Federal Grand Jury¹⁷

The federal grand jury¹⁸ consists of sixteen to twenty-three persons¹⁹ who are summoned by the court²⁰ to serve for a period of up to eighteen months.²¹ The grand jury has two responsibilities.²² As an investigatory body,²³ it gathers and examines evidence to determine whether a suspect has committed a federal offense.²⁴ As an accusatory body, it determines whether probable cause exists and thus whether it can indict the target of its investigation.²⁵

Three vital features characterize the modern grand jury—independence, secrecy, and expansive powers. The Supreme Court has frequently

17. It is beyond the scope of this Article to include a history of the grand jury. For a discussion of this subject, see 1 SARA SUN BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW AND PRACTICE* 1-41 (1987); MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 3-17 (1977); RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-941* (1963).

18. Due to the variations among the different states grand juries, this Article focuses on the federal grand jury. The federal constitutional analysis which follows applies to both federal and state grand juries.

19. 18 U.S.C. § 3321 (1988); FED. R. CRIM. P. 6(a).

20. FED. R. CRIM. P. 6(a).

21. FED. R. CRIM. P. 6(g). The court may extend the 18 month period of service for a maximum additional period of six months. *Id.*

22. *United States v. Calandra*, 414 U.S. 338, 343-44 (1974).

23. This Article focuses on the investigatory function of the grand jury because it is in this capacity that subpoenas for blood samples are issued.

24. *Calandra*, 414 U.S. at 343-44 ("A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person."); see also *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972) (stating that a grand jury has broad powers of investigation to determine whether a particular individual should be charged with a crime).

25. *Calandra*, 414 U.S. at 343-44.

reiterated the significance of each of these features and has acted to ensure that none of them is compromised.²⁶ Whether a grand jury subpoena for blood is an unreasonable search is a thorny question, for if it is, the Court must impose constitutional restraints on the grand jury's authority to subpoena such evidence. Such restraints collide with each of the grand jury's three vital characteristics.

A. *Independence of the Grand Jury*

Recently the Court declared that the grand jury "belongs to no branch of the institutional government."²⁷ Instead, it serves "as a kind of buffer or referee between the Government and the people."²⁸ Although it functions with the support of the judiciary,²⁹ the grand jury may not be controlled by the courts.³⁰

The grand jury's independence emanates from its history.³¹ The range and the exercise of its power evinces its autonomy.³² A judge does not preside over its proceedings.³³ Although the court summons individuals to serve on the grand jury,³⁴ appoints the foreperson and deputy foreperson,³⁵ and enforces grand jury subpoenas,³⁶ it is not involved in the day-to-day operation of the body. Due to the high value placed on the grand jury's independence, the United States Supreme Court has made it clear that, despite frequent requests to do so,³⁷ it will not use its supervisory power³⁸ to impose rules of procedure for the grand jury.³⁹

26. See, e.g., *United States v. Williams*, 112 S. Ct. 1735, 1742-44 (1992) (stating that the grand jury is independent from the judicial branch and that it has expansive power to regulate its own activities); *United States v. R. Enters., Inc.*, 498 U.S. 292, 297-99 (1991) (reviewing the qualities of grand jury proceedings that include strict secrecy and broad powers of investigation); *Calandra*, 414 U.S. at 342-45 (explaining that the grand jury can go beyond rules of evidence in their investigation and that its meetings are conducted in secret); *Costello v. United States*, 350 U.S. 359, 361-63 (describing the power and independence a grand jury enjoys in order to reach its decisions).

27. *Williams*, 112 S. Ct. at 1742.

28. *Id.*

29. For example, the grand jury generally meets in the courthouse. *Id.* Its procedures are governed by the Federal Rules of Criminal Procedure 6 and 17.

30. *Williams*, 112 S. Ct. at 1742.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (referring to FED. R. CRIM. P. 6(a)(1)).

35. *Id.* (referring to FED. R. CRIM. P. 6(c)).

36. *Id.* at 1743.

37. *Id.*

38. *Id.* (refusing to use its supervisory power to require that a prosecutor present substantial exculpatory evidence to a grand jury).

39. *Id.*; see also, *United States v. Calandra*, 414 U.S. 338, 350 (1974) (refusing to apply

Despite the ostensible importance of independence, prosecutors, as representatives of the Executive branch, assume a critical role in the work of the grand jury.⁴⁰ Not only do prosecutors select which matters to bring to the grand jury,⁴¹ but they also decide which witnesses⁴² and evidence to subpoena.⁴³ They examine the witnesses before the grand jury,⁴⁴ decide what evidence to submit to that body,⁴⁵ and prepare the indictment for the grand jury's review.⁴⁶

Prosecutors may serve a subpoena without securing the prior approval of the grand jury.⁴⁷ After reviewing evidence received pursuant to a

the Fourth Amendment's exclusionary rule to grand jury proceedings); *Costello v. United States*, 350 U.S. 359, 364 (1956) (refusing to apply hearsay rule to the grand jury proceedings).

40. Bennett L. Gersham, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 400-01 (1992); see also James F. Holderman, *Preindictment Prosecutorial Conduct In The Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1, 5 (1980) (stating that investigations by the grand jury are controlled primarily by prosecutors).

41. *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977); *In re Grand Jury (Arrington)*, 782 F. Supp. 1518, 1522 (N.D. Ala. 1992), *dismissed as moot in part, affirmed in part*, 955 F.2d 670 (11th Cir. 1992).

42. Holderman, *supra* note 40, at 5 n.42; *Doe v. DiGenova*, 779 F.2d 74, 80 n.11 (D.C. Cir. 1985) ("In this sense, the term 'grand jury subpoena,' can be a bit misleading, inasmuch as it implies a grand jury decision to compel testimony or the delivery of documents. It is important to realize that a grand jury subpoena gets its name from the intended use of the testimony, or documentary evidence, not from the source of its issuance.").

43. Holderman, *supra* note 40, at 5 n.42; *Doe*, 779 F.2d at 80 ("Rather, grand jury subpoenas are issued at the request, and in the discretion of the prosecuting attorney involved in the case . . ."); *In re New Haven Grand Jury*, 604 F. Supp. 453, 460 (D. Conn. 1985) ("It is equally true, however, that no grand jury, 'runaway' or otherwise, is vested with the discretionary power to determine whether a prosecution shall be commenced or maintained. It is well to remember that the commencement of a federal criminal case by submission of evidence to a grand jury is 'an executive function within the exclusive prerogative of the Attorney General.'"); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 521-22 (E.D.N.Y. 1974) ("It is now the United States Attorney who gathers the evidence for later presentation to the grand jury. He calls and examines witnesses, presents documents, explains the law, sums up the evidence and requests an indictment. . . . Though the grand jury may request evidence, the function of issuing process to obtain it belongs to another. It is the prosecutor who has the initiative and power by subpoena to bring proof to the courthouse.").

44. *In re Grand Jury (Arrington)*, 782 F. Supp. at 1522.

45. *Chanen*, 549 F.2d at 1312.

46. *Id.*

47. *United States v. Anglian*, 784 F.2d 765, 769 (6th Cir. 1986) ("This court has held that a United States Attorney may properly issue a grand jury subpoena without prior direction from the grand jury . . ."); *United States v. Santucci*, 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983) (holding there was no "problem with permitting the United States Attorney to fill in blank grand jury subpoenas requiring the identification material without actual prior grand jury authorization"); *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976) ("The United States Attorney may obtain subpoenas issued in blank by the court, fill in the blanks, and have the witnesses served without consulting the grand jury.") (citations omitted).

subpoena, prosecutors may make a variety of choices. For example, they may decide not to present the evidence to the grand jury,⁴⁸ or they may choose to offer it to a grand jury other than the one for whom it was originally subpoenaed.⁴⁹ Through this substantial discretion, prosecutors initiate and control the grand jury investigations.⁵⁰

B. *Secrecy of the Grand Jury*

When the English institution of the grand jury was adopted in Eighteenth Century America, it came complete with confidentiality provisions.⁵¹ Rule 6(e) of the Federal Rules of Criminal Procedure (FRCRP) codified these requirements.⁵²

Secrecy⁵³ safeguards the impartiality of the grand jury and ensures its autonomy from the Government.⁵⁴ The Supreme Court has recognized

48. Holderman, *supra* note 40, at 8.

49. *United States v. Gakoumis*, 624 F. Supp. 655, 657 (E.D. Pa. 1985) (“[H]aving one grand jury subpoena evidence and another grand jury presented with the evidence is [unquestionably proper].”); *In re Immunity Order*, 543 F. Supp. 1075, 1077 (S.D.N.Y. 1982) (“[S]ubpoenaed documents need not be presented exclusively to the grand jury in whose name they were first demanded.”); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 523 (E.D.N.Y. 1974) (“That a different grand jury from the one which subpoenas the evidence is presented with that evidence is of little import.”).

50. *In re New Haven Grand Jury*, 604 F. Supp. 453, 460 (D. Conn. 1985). This fact has led to the following comment by one jurist:

This great institution has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.

United States v. Mara, 410 U.S. 19, 23 (1973) (quoting Senior District Judge William Campbell).

51. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 211, 218 n.9 (1979).

52. FED. R. CRIM. P. 6(e)(2) provides:

General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

FED. R. CRIM. P. 6(e)(2).

53. For a detailed discussion of the grand jury’s secrecy provisions, see J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169 (1983); Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Andrea M. Nervi, Comment, *FRCRP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. CHI. L. REV. 221 (1990).

54. *Butterworth v. Smith*, 494 U.S. 624, 629 (1990).

that secrecy serves other interests as well.⁵⁵ For example, it encourages witnesses to come forward and testify candidly because they are assured that their testimony will be kept secret from others, including those under investigation.⁵⁶ It also diminishes the risk that a potential indictee will seek to influence a witness's testimony or will flee from the jurisdiction upon learning of the investigation.⁵⁷ In addition, secrecy reduces the harm to those who are investigated but ultimately are exonerated.⁵⁸

Secrecy, however, is not absolute.⁵⁹ A court may order the disclosure of grand jury transcripts upon the request of either the Government or the defendant.⁶⁰ The Supreme Court has recognized that in the face of "compelling necessity,"⁶¹ it will consider granting an exception to the confidentiality provisions.⁶² In making such a decision, the Court will balance the individual's interest in disclosure against the public's interest in secrecy.⁶³ The burden of showing compelling need is on the parties seeking disclosure. They must show that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."⁶⁴ A court enjoys "substantial discretion" when deciding this issue.⁶⁵ Moreover, its decision will not be overturned unless it constitutes an abuse of discretion.⁶⁶

55. *Id.*; *Douglas Oil Co.*, 441 U.S. at 211.

56. *Butterworth*, 494 U.S. at 630.

57. *Id.*

58. *Id.*

59. *See, e.g.*, FED. R. CRIM. P. 6(e)(3)(C).

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Id.

60. *Id.*

61. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

62. *Id.*

63. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

64. *Id.*

65. *Id.* at 223.

66. *Id.* at 228.

C. *Expansive Power of the Grand Jury*

The Supreme Court has repeatedly declared that the grand jury's historic mission of investigating crimes and indicting offenders requires an exercise of broad powers.⁶⁷ The proceedings are not adversarial and are not intended to adjudicate the guilt or innocence of a suspect.⁶⁸ Instead, grand juries "determine whether a crime has been committed and whether criminal proceedings should be instituted against any person."⁶⁹ An investigation may be initiated on the basis of "tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."⁷⁰ The Court has stressed that "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."⁷¹

In order to fully investigate the matter before it, a grand jury enjoys broad subpoena powers. The Supreme Court has stated that a summoned individual has a public duty to appear in court to testify.⁷² Despite burden, inconvenience, or sacrifice, a subpoenaed person must appear as a "necessary contribution of the individual to the welfare of the public."⁷³ Refusal to comply with a subpoena may lead the court to find an individual in either civil⁷⁴ or criminal⁷⁵ contempt.⁷⁶

67. *See, e.g.*, *Blair v. United States*, 250 U.S. 273, 282 (1919); *see also* *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Johnson*, 319 U.S. 503, 510 (1943).

68. *Calandra*, 414 U.S. at 343.

69. *Id.* at 343-44.

70. *Calandra*, 414 U.S. at 344 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701-02 (1972) (citing *Costello v. United States*, 350 U.S. 359, 362 (1956))).

71. *United States v. Dionisio*, 410 U.S. 1, 13 (1973) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)).

72. *Blair v. United States*, 250 U.S. 273, 280-81 (1919).

73. *Id.* at 281.

74. 28 U.S.C. § 1826 (1994).

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Id.

75. 18 U.S.C. § 401 (1988) ("A court of the United States shall have power to punish by

The modern provisions for issuing and serving subpoenas in criminal cases appear in the Federal Rules of Criminal Procedure. FRCP 17(a) provides for a subpoena ad testificandum, directing an individual to attend and give testimony at a certain time and location.⁷⁷ FRCP 17(c) provides for a subpoena duces tecum, requiring the recipient to appear and produce designated "books, papers, documents or other objects."⁷⁸

Pursuant to FRCP 17, the clerk, rather than a judge, issues a subpoena under the seal of the court.⁷⁹ The subpoena merely states the name of the court and the title of the proceeding. It directs the recipient to appear to testify⁸⁰ and/or to produce certain papers or objects.⁸¹ The remainder of the form is blank.⁸² The party seeking to serve the subpoena must fill in the blanks.⁸³ Prior judicial approval is generally not required before a subpoena is issued or served.⁸⁴ A subpoena is easier to secure

fine or imprisonment, at its discretion, such contempt of its authority, and none other, as. . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.").

76. FED. R. CRIM. P. 17(g) ("*Contempt*. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.").

77. FED. R. CRIM. P. 17(a).

For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

Id.

78. FED. R. CRIM. P. 17(c).

For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive . . .

Id.

79. FED. R. CRIM. P. 17(a).

80. *Id.*

81. FED. R. CRIM. P. 17(c).

82. FED. R. CRIM. P. 17(a).

83. *Id.*

84. See *Baylson v. Disciplinary Bd. of Pa.*, 975 F.2d 102, 108 (3d Cir. 1992) ("[N]either Rule 17 nor any other provision in the federal rules or statutes allows for judicial intervention before a subpoena is served. . . . [N]othing in Rule 17 grants to the district court what Rule 3.10 purports to do by means of a local rule: the power to screen grand jury subpoenas prior to service."). But see *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1986), *vacated, opinion withdrawn*, 832 F.2d 664, 667, 668 (1st Cir. 1987) (en banc) (holding that the federal district

than a search warrant because a subpoena does not involve the judiciary and does not require a preliminary showing of probable cause.⁸⁵ Moreover, in all cases, a grand jury subpoena is presumed to be reasonable.⁸⁶

Because of the "special role" of the grand jury, the Court will not permit any "technical rules" to delay or disrupt its operation.⁸⁷ Thus, a facially valid indictment based on either inadequate or incompetent evidence is not subject to challenge.⁸⁸ The Fourth Amendment's exclusionary rule does not apply to grand jury proceedings.⁸⁹ A prosecutor need not present exculpatory evidence to the grand jury before it returns an indictment.⁹⁰

The power of the grand jury, however, is not without limits. The Court has repeatedly declared that a grand jury may not abridge the rights of the individual while exercising its broad investigatory powers.⁹¹ Consequently, a grand jury may not engage in a fishing expedition.⁹² It may not use its power to harass or malign an individual,⁹³ and it may not violate a witness's valid exercise of a Constitutional, statutory or common law privilege.⁹⁴ Likewise, the subpoena power of the grand jury is not "some talisman that dissolves all constitutional protections."⁹⁵ Consequently, a subpoena may not be used to harass the press or disrupt its operations in violation of the First Amendment.⁹⁶ Similarly, it may not be used to force a witness to incriminate himself in violation of his Fifth Amendment privilege,⁹⁷ and it may not invade an individual's legitimate expectation of privacy in violation of the Fourth Amendment.⁹⁸

Pursuant to FRCP 17(c), subpoena recipients may move to quash a subpoena if compliance would be unreasonable or oppressive.⁹⁹ Under the Fourth Amendment, a recipient may challenge the subpoena on the grounds that it is constitutionally unreasonable.¹⁰⁰ Part III of this Article examines

court could adopt a local rule which requires prosecutors to seek prior judicial approval before serving a grand jury subpoena to obtain evidence from an attorney about his clients).

85. *Zurcher v. Stanford Daily*, 436 U.S. 547, 562-63 (1978).

86. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

87. *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

88. *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

89. *United States v. Calandra*, 414 U.S. 338, 350 (1974).

90. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992).

91. See *infra* notes 92-98 and accompanying text.

92. *United States v. R. Enters., Inc.*, 480 U.S. 292, 299 (1991).

93. *Id.*

94. *United States v. Calandra*, 414 U.S. 338, 346 (1974).

95. *United States v. Dionisio*, 410 U.S. 1, 11 (1973).

96. *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

97. *United States v. Dionisio*, 410 U.S. 1, 11 (1973).

98. *Calandra*, 414 U.S. at 346.

99. FED. R. CRIM. P. 17(c).

100. *Hale v. Henkel*, 201 U.S. 43, 56 (1906).

the interaction between the Government's power to subpoena and a person's Fourth Amendment rights.

III. The Government's Power to Subpoena and the Fourth Amendment

For most of the twentieth century, the Supreme Court has been unwilling to fully apply the Fourth Amendment to a subpoena for evidence.¹⁰¹ Although it had once treated a subpoena just like any other Fourth Amendment "search,"¹⁰² for practical reasons, the Court abandoned this perspective and limited the applicability of the Constitution to a subpoena.¹⁰³

In 1886, the Supreme Court considered for the first time whether the Government's demand for personal papers constituted an unreasonable search or a seizure under the Fourth Amendment.¹⁰⁴ In *Boyd v. United States*,¹⁰⁵ the Court analyzed the constitutionality of a statute that authorized the Government to compel a partnership¹⁰⁶ to produce an invoice for use as evidence against the partnership at trial.¹⁰⁷ The Court conceded that while such a demand does not constitute either a "forcible entry into

101. See, e.g., *Hale*, 201 U.S. at 73; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217 (1946); *Dionisio*, 410 U.S. at 14-15; *United States v. Mara*, 410 U.S. 19, 21 (1973); *United States v. Miller*, 425 U.S. 435, 446 (1976); *Donovan v. Lone Star, Inc.*, 464 U.S. 408, 415 (1984).

102. *Boyd v. United States*, 116 U.S. 616, 633 (1886).

103. *Hale*, 201 U.S. at 72-73.

104. *Boyd*, 116 U.S. at 633. For a detailed analysis of this case, see Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343, 362-73 (1979); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under The Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 948-64 (1977) [hereinafter Note, *Formalism*]; and Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977).

105. 116 U.S. 616 (1886).

106. In *Boyd* the Court did not address whether Boyd and Sons, a partnership, should be treated differently from an individual under the Fourth and Fifth Amendments. In later cases, the Court ruled that the Fourth Amendment does apply to such entities but that the Fifth Amendment does not. See, e.g., *Braswell v. United States*, 487 U.S. 99, 118 (1988); *Bellis v. United States*, 417 U.S. 85, 101 (1974); *United States v. White*, 322 U.S. 694, 704 (1944); *Hale*, 201 U.S. at 73.

107. *Boyd*, 116 U.S. at 619-21. The Government moved for an order pursuant to the fifth section of the "act to amend the customs-revenue laws and to repeal moiety laws" passed on June 22, 1874 (18 Stat. 186) to compel Boyd and Sons to produce the invoice. *Id.* at 619. The Court granted the motion and ordered Boyd and Sons to produce the invoice. The statute further provided that, had Boyd refused to produce the invoice after receiving this order, the allegations in the Government's motion would be taken as "confessed." *Id.* at 620.

a man's house"¹⁰⁸ or a "searching amongst his papers,"¹⁰⁹ it "accomplishes the substantial object of those acts in forcing"¹¹⁰ from a party evidence against himself."¹¹¹ Consequently, the Court concluded that compelling the production of a party's papers "to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution. . . ."¹¹²

The Court further decided that the order in question was unreasonable under the Fourth Amendment because it compelled the defendant to produce "mere evidence" to which the Government was not entitled as opposed to stolen property or contraband to which it was entitled.¹¹³ As a result, it ruled that, by authorizing an unreasonable search and seizure, the statute violated the Fourth Amendment.¹¹⁴

Additionally, the Court construed the Fourth and Fifth Amendments together and held that the unreasonable search and seizure in *Boyd* also violated the defendant's privilege against self-incrimination.¹¹⁵ It ruled that the compelled production of these private papers for use as evidence against Boyd at trial constituted an unreasonable search and seizure that required the partnership to inculcate itself in wrongdoing.¹¹⁶ The Court concluded that compelling a party to produce his personal documents to convict him of a crime or to forfeit his property violates the Constitution and is "abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."¹¹⁷

This expansive view of the Fourth Amendment was short-lived. Only twenty years later, in *Hale v. Henkel*,¹¹⁸ the Court reexamined the interaction between the government's power to demand physical evidence and the Fourth Amendment. It severely constricted the concepts it had conceived

108. *Id.* at 622.

109. *Id.*

110. The Court found that the production was *compelled* because if the party did not obey the order, the allegations contained in the motion were taken as proven: "If he does not produce them [the papers demanded], the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of." *Id.* at 621-22.

111. *Id.* at 622.

112. *Id.*

113. Note, *Formalism*, *supra* note 104, at 952-53. The Court abandoned this theory of Fourth Amendment jurisprudence in *Warden v. Hayden*, 387 U.S. 294, 310 (1967).

114. *Boyd*, 116 U.S. at 633-35.

115. *Id.* at 633.

116. *Id.* at 634-35.

117. *Id.* at 632.

118. 201 U.S. 43 (1906).

in *Boyd*.¹¹⁹

First, the Court divided the Fourth and Fifth Amendment analysis,¹²⁰ separating the notion of an unreasonable search and seizure under the former from compelled self-incrimination under the latter.¹²¹ Merely by announcing that it "would be 'utterly impossible to carry on the administration of justice' without this writ,"¹²² the Court flatly declared that the Fourth Amendment should not be read as an impediment to the court's power to compel the production of documents.¹²³

Despite this view, the Court did not dismiss the Fourth Amendment entirely. Instead it decided that a subpoena for the production of evidence would constitute an unreasonable search and seizure if its scope was too broad.¹²⁴ Applying this test to the subpoena in question, the Court held that the subpoena was "far too sweeping in its terms to be regarded as reasonable."¹²⁵ It stated that the Government would be required to establish "some necessity" for the documents subpoenaed before the Court would compel their production.¹²⁶

In his concurrence, Justice McKenna found the Fourth Amendment inapplicable to a subpoena duces tecum,¹²⁷ concluding that the characteristics of a subpoena are distinguishable from those of a search warrant.¹²⁸

119. *Id.* at 71-79.

120. *Id.* at 72.

121. *Id.* at 72-73. With respect to the Fifth Amendment, the Court held that it was not applicable in this case because the subpoena was served upon a corporate officer who could not rely on the Fifth Amendment for protection. *Id.* at 74-75. Because the State creates a corporation, the government may accord it special benefits and may limit its rights, including the Fifth Amendment privilege against self-incrimination. *Id.* "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Id.* at 75.

122. *Id.* at 73 (quoting *Summers v. Moseley*, 2 Cr. & M. 477 (1834)).

123. *Id.* at 75.

124. *Id.* at 76.

125. *Id.*

126. *Id.* at 77. The Court compared this broad subpoena duces tecum to a general warrant and found them to be "equally indefensible." *Id.*

127. *Id.* at 80 (McKenna, J., concurring) ("It is said 'a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner.' Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant.").

128. *Id.* at 80-81 (McKenna, J., concurring).

The distinction [between a subpoena and a search warrant] is based upon what is authorized or directed to be done—not upon the form of words by which the authority or command is given. 'The quest of an officer' acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of

Consequently, Justice McKenna rejected the majority's view that the Government must show "necessity" in the case of an overbroad subpoena.¹²⁹

The decision in *Hale*, as one court noted, "left the applicability of the Fourth Amendment to subpoenas *duces tecum* in a most confusing state."¹³⁰ This confusion stemmed from the fact that the Court was ambivalent about whether and how the Fourth Amendment applied to a grand jury subpoena.¹³¹ Consequently, forty years after *Hale*,¹³² the Supreme Court was again examining the interaction between the Fourth Amendment and a subpoena *duces tecum*.

In *Oklahoma Press Publishing Company v. Walling*,¹³³ two publishing corporations challenged the constitutionality of administrative subpoenas served upon them by the Department of Labor.¹³⁴ The subpoenas sought corporate records to determine whether the publishers were disobeying the Fair Labor Standards Act.¹³⁵ The publishers contended that these subpoenas constituted unreasonable intrusions because they authorized the Government to sift through the companies' records to gather evidence of possible statutory violations.¹³⁶

The Supreme Court quickly disposed of this argument.¹³⁷ It doubted whether the Fourth Amendment even applied to the subpoena power.¹³⁸ The Court distinguished a warrant from a subpoena.¹³⁹ While the former

property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the law, and it is all that can be allowed without serious embarrassment to the administration of justice.

Id.

129. *Id.* at 81 (McKenna, J. concurring) ("Can a subpoena lose this essential distinction from a search warrant by the generality or specialty of its terms? I think not.").

130. *In re Horowitz*, 482 F.2d 72, 76 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973).

131. *Id.*

None of the Justices seemed to think that such a subpoena could be issued only 'upon probable cause, supported by oath or affirmation,' as would be required for a search warrant. Nevertheless, except for Mr. Justice McKenna, all were of the view that an overbroad *subpoena duces tecum* against an individual would be an unreasonable search and seizure.

Id.

132. 201 U.S. 43 (1906).

133. 327 U.S. 186 (1946).

134. *Id.* at 189.

135. *Id.*

136. *Id.*

137. *Id.* at 195.

138. James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 86 (1977).

139. *Oklahoma Press*, 327 U.S. at 195.

called for an "actual search," the latter merely required a "constructive" one.¹⁴⁰ Relying on one sentence in a text about the history of the Fourth Amendment,¹⁴¹ the Court seized upon this vague distinction to question the applicability of the Fourth Amendment¹⁴² to the subpoena power.¹⁴³ Ultimately the Court would not commit to the application of the Fourth Amendment to a government subpoena.¹⁴⁴ Nonetheless, it recognized that overbreadth challenges to a subpoena would be appropriate,¹⁴⁵ and that those challenges should be evaluated under the Fourth Amendment.¹⁴⁶

In order to ensure "reasonableness," the Court set forth two requirements: First, the investigation for which the subpoena was issued must be lawful. Second, the evidence sought must be relevant to that investiga-

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.

Id. (footnote omitted).

140. *Id.* at 202.

141. *Id.* at 202 n.28 ("In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power.") (quoting NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 137 (1970)) (emphasis in original).

142. Ironically in his text, Professor Lasson explained that the Fourth Amendment did apply to a government subpoena:

The principle there [in *Boyd*] laid down, however, applies equally if not more so to the subpoena *duces tecum*, namely, that to compel a person in a criminal case to furnish documents to be used against himself accomplished the purpose of a search and seizure and violates the Fourth Amendment as to unreasonable searches and seizures and the Fifth Amendment as to compulsory self-incrimination.

NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 136 (1970) (citing *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894)).

143. *Oklahoma Press*, 327 U.S. at 202 ("Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.").

144. *Id.* at 208 ("[T]he Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.") (emphasis added).

145. *Id.* at 213 ("They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest.").

146. *Id.* at 208 ("The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.").

tion.¹⁴⁷ The particularity requirement that is included in this reasonableness inquiry would be fulfilled if the subpoena was specific and limited in its demands.¹⁴⁸ The Court recognized that its decision was a “compromise” that had been effected to satisfy both public and private interests,¹⁴⁹ but that it was appropriate because a subpoena implicates interests distinct from those that a warrant implicates.¹⁵⁰ Consequently, different safeguards had to be provided for those served with a subpoena rather than a warrant.¹⁵¹

Because the Supreme Court’s decisions on whether the Fourth Amendment fully applied to subpoenas were ambiguous,¹⁵² the issue remained unresolved. Almost thirty years after its decision in *Oklahoma Press*, the Court again grappled with whether a subpoena involved either a

147. *Id.* at 209.

148. *Id.*

149. *See id.* at 213 (balancing the “interests of men to be free from officious intermeddling” with the interest of the public in securing evidence).

150. *Id.*

151. The Court also decided that although a corporation is not protected by the Fifth Amendment, it is somewhat protected by the Fourth Amendment. *Id.* at 208. In *United States v. Morton Salt Co.*, the Court reiterated that a corporation is protected by the Fourth Amendment, but not to the same extent as an individual:

[N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from the government often carry with them an enhanced measure of regulation.

United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citations omitted).

Although *Oklahoma Press* involved an administrative subpoena, the Court soon made it clear that it saw no distinction between an administrative subpoena and a subpoena issued by a grand jury, claiming that:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Id. at 642-43.

152. *See, e.g., Oklahoma Press*, 327 U.S. at 208; *Hale v. Henkel*, 201 U.S. 43, 71-76 (1906).

search or a seizure.¹⁵³ In the interim, however, the Court had dramatically changed its vision of what constituted a search under the Fourth Amendment.¹⁵⁴

Before 1967, in order to determine whether a Fourth Amendment search had occurred, the Court examined whether there had been a governmental invasion into a "constitutionally protected area."¹⁵⁵ However, in *Katz v. United States*,¹⁵⁶ the Court held that a search no longer involved such a physical trespass¹⁵⁷ because "the Fourth Amendment protects people, not places."¹⁵⁸ It stressed that "the premise that property interests control the right of the Government to search and seize has been discredited,"¹⁵⁹ and that the application of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."¹⁶⁰ Instead in order to determine whether a search had occurred, the Court would now consider whether the Government's action "violated the privacy upon which he [the defendant] justifiably relied."¹⁶¹ The Court declared that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."¹⁶²

153. *United States v. Dionisio*, 410 U.S. 1, 8-18 (1973); *United States v. Mara*, 410 U.S. 19, 21-22 (1973). For an analysis of *Dionisio*, see Note, *United States v. Dionisio: The Grand Jury and The Fourth Amendment*, 73 COLUM. L. REV. 1145 (1973) (examining the extent to which the Fourth Amendment limits prosecutorial control of the grand jury process).

154. *Katz v. United States*, 389 U.S. 347 (1967).

155. *Id.* at 351. A "constitutionally protected area," was one that was named in the Fourth Amendment: persons, houses, papers, and effects. See, e.g., *Lopez v. United States*, 373 U.S. 427, 440 (1963); *Silverman v. United States*, 365 U.S. 505, 512 (1961); *Olmstead v. United States*, 277 U.S. 438, 464 (1928); *Hester v. United States*, 265 U.S. 57, 59 (1924).

156. 389 U.S. 347 (1967).

157. *Id.* at 352-53.

158. *Id.* at 351.

159. *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)). For a thorough analysis of the evolution of Fourth Amendment jurisprudence from property rights to privacy concerns, see Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993).

160. *Katz*, 389 U.S. at 353.

161. *Id.* In his now famous concurring opinion, Justice Harlan set forth the test for determining whether a search under the Fourth Amendment had occurred:

The question, however, is what protection it [the Fourth Amendment] affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'

Id. at 361 (Harlan, J., concurring).

162. *Id.* at 351-52 (citation omitted).

The Court applied this new approach to the determination of whether a Fourth Amendment search occurred in *United States v. Dionisio*. In that case, the grand jury issued subpoenas to Dionisio and approximately twenty others.¹⁶³ Rather than demand the production of documents, however, the subpoenas required the recipients to provide voice exemplars.¹⁶⁴ These exemplars were to be analyzed and compared with voice recordings the grand jury already possessed.¹⁶⁵ Dionisio challenged the subpoena on Fourth and Fifth Amendment grounds.¹⁶⁶ The Supreme Court found no constitutional violation.¹⁶⁷

With respect to the Fourth Amendment, the Court again examined whether a subpoena involved either a seizure or a search. The Court quickly concluded that the service of a subpoena to appear before the grand jury does not constitute a seizure under the Fourth Amendment.¹⁶⁸ The Court declared that a subpoena does not exert the same type of compulsion on a person as does an arrest or an investigative stop.¹⁶⁹ Even though the subpoena may cause inconvenience, it is not as abrupt or as stigmatizing as an arrest.¹⁷⁰ In contrast, it is served in the same way as any other legal process.¹⁷¹ If the recipient cannot appear as demanded, he can seek to reschedule the appearance.¹⁷²

Furthermore, the Court decided that this particular directive, to provide a voice exemplar, did not constitute a search under the Fourth Amendment.¹⁷³ In *Katz v. United States*, the Court had held that a search occurs only when the government intrudes upon a person's reasonable expectation of privacy,¹⁷⁴ stressing that the Fourth Amendment does not provide any protection for that which "a person knowingly exposes to the public."¹⁷⁵

163. *United States v. Dionisio*, 410 U.S. 1, 3 (1973).

164. *Id.*

165. *Id.*

166. *Id.*

167. In *Dionisio*, the Court held that the Fifth Amendment privilege against self-incrimination did not apply because the compelled production of the voice exemplars did not encompass any testimonial content. *Id.* at 5-7. Since the Government intended to use the exemplars to analyze only the physical characteristics of the voices and not their content, the Court held that the privilege did not apply. *Id.* In a companion case, the Court issued the same ruling with respect to handwriting exemplars. *United States v. Mara*, 410 U.S. 19, 22 (1973).

168. *Dionisio*, 410 U.S. at 9.

169. *Id.* at 10.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 14-15. In a companion case, the Court reached the same conclusion with respect to handwriting exemplars. *United States v. Mara*, 410 U.S. 19, 22 (1973).

174. *Katz v. United States*, 389 U.S. 347, 353 (1967).

175. *Dionisio*, 410 U.S. at 14 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

According to the Court, the physical characteristics of a person's voice, "as opposed to the content of a specific conversation," are always exposed to the public.¹⁷⁶ Consequently, no person could entertain a reasonable expectation of privacy in the sound of his voice. Therefore, the directive to provide a sample of one's voice does not constitute a search under the Fourth Amendment.¹⁷⁷ The Court ultimately concluded that the Government did not need to show the "reasonableness" of this demand because the Fourth Amendment did not apply to such a subpoena.¹⁷⁸

The Court has repeatedly sought to limit the applicability of the Fourth Amendment to a Government subpoena.¹⁷⁹ It has made it clear that a subpoena does not constitute a seizure under the Fourth Amendment.¹⁸⁰ It has been less clear on whether a subpoena involves a Fourth Amendment search.¹⁸¹ Although it has concluded that a subpoena usually does not constitute a search under the Fourth Amendment,¹⁸² it has left open the question of whether under certain circumstances, a subpoena may so deeply invade a person's reasonable expectation of privacy as to constitute a Fourth Amendment search. Accordingly, Part IV examines whether a grand jury subpoena for blood does so.

176. *Id.*

177. *Id.* at 14-15. Significantly, the Court recognized the constitutional distinction between a subpoena which called for an invasion of the body and one which did not. *Id.*

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."

Id. (quoting *Schmerber v. California*, 384 U.S. 757, 769-70 (1966)).

178. *Dionisio*, 410 U.S. at 15.

179. *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (holding that a grand jury subpoena requiring the production of checks and bank records did not violate the Fourth Amendment); *Dionisio*, 410 U.S. at 14-16 (holding that a grand jury subpoena for a voice exemplar did not violate the Fourth Amendment); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194-96 (1946) (holding that the Fourth Amendment does not prohibit issuing subpoenas for specific records that will be used to evaluate possible violations of the Fair Labor Standards Act); *Hale v. Henkel*, 201 U.S. 43, 75 (1906) ("We think it quite clear that the Search and Seizure Clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence.").

180. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984); *Dionisio*, 410 U.S. at 9 ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense."); 3 WAYNE R. LAFAVE, *SEARCH & SEIZURE* § 9.6(a), at 556 (2nd ed. 1987).

181. Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 615-16 (1987).

182. 3 LAFAVE, *supra* note 180, § 9.6(a), at 556-59 (noting that demanding voice exemplars, "handwriting exemplars, fingerprints, shoe and footprints and photographs, the holding of a lineup, and similar procedures" pursuant to subpoenas are not seizures).

IV. The Constitutionality of a Grand Jury Subpoena to Extract Blood

A seven-year-old girl is playing outside her home. During broad daylight, the child is kidnapped by two unknown persons. Fifteen months after the kidnapping, the girl's remains are found in a canyon, twenty-two miles from her home. The federal grand jury in the Southern District of California initiates an investigation of the crime. It begins to focus in on a neighbor who lived near the youngster. He is a forty-year-old man who bears no resemblance to the descriptions of the kidnappers provided by witnesses to the offense. He does, however, have a criminal record, including a felony conviction for child molestation. An earlier search of his car and home yielded no evidence. The prosecutor advises the man that he is a target of a grand jury investigation into this offense. The Government serves a subpoena upon him, demanding that he provide hair and blood samples for DNA testing. He refuses, claiming that this subpoena violates his Fourth Amendment rights.¹⁸³

A. DNA Testing

Since the forensic testing of DNA emerged during the 1980s, grand juries, like the one described above, have begun to use their subpoena power to demand samples of blood from known persons to compare with specimens from unknown sources.¹⁸⁴ If the DNA test revealed a "match" between the two samples, the grand jury would have incriminating evidence against a possible suspect. Conversely, if the analysis revealed no "match," the suspect could be exonerated.

DNA is a molecule that is found in the chromosomes¹⁸⁵ of cells.¹⁸⁶

183. Alan Abrahamson, *Jury Subpoenas Oceanside Man in Leticia Hernandez Probe*, L.A. TIMES, Mar. 21, 1991, at B1, B10.

184. *E.g.*, *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1197 (W.D. Ky. 1993); *Henry v. Ryan*, 775 F. Supp. 247, 249-50 (N.D. Ill. 1991); *United States v. Infelise*, 773 F. Supp. 93, 95 (N.D. Ill. 1991); *Grand Jury v. Marquez*, 604 N.E.2d 929, 931 (Ill. 1992); *Woolverton v. Grand Jury*, 859 P.2d 1112, 1113 (Okla. Crim. App. 1993).

185. William C. Thompson, *Evaluating The Admissibility of New Genetic Identification Tests: Lessons From the "DNA War,"* 84 J. CRIM. L. & CRIMINOLOGY 22, 26 n.18 (1993).

DNA is a long, double-stranded molecule found in the chromosomes carried in all cell nuclei. The structure of DNA is similar to a long, twisted ladder in which the 'rungs' consist of pairs of molecules called base-pairs. There are four different bases, labeled A, T, G, and C which always form into the base-pairs A-T and C-G; the sequence of these base-pairs on the DNA strand constitutes the genetic code. Although most sections of the DNA molecule vary little from individual to individual within a species, some sections are polymorphic, which means that they have different forms in different individuals. The different forms are called

DNA testing¹⁸⁷ reveals genetic differences among different people.¹⁸⁸ "Like traditional genetic tests, DNA typing is used in the forensic context to determine whether biological material from a known individual can be linked to a sample from an unidentified specimen (i.e., whether the individual can be included in or excluded from the population of humans who could have deposited the biological material)."¹⁸⁹ The fact that each person has a unique DNA pattern helps either identify or exclude certain persons as criminal suspects.¹⁹⁰ The use of DNA typing as a screening device for suspects has made the procedure popular with criminal investigators and caused observers to herald it as a revolutionary crime-solving procedure.¹⁹¹

Law enforcement agencies favor DNA testing over other scientific testing for a number of reasons. For example, in cases where eyewitnesses are not available, DNA analysis is advantageous¹⁹² because no two people, other than identical twins, share the same genetic composition.¹⁹³ In addition, the test can be conducted on a wide array of biological substances, including blood and semen, which are often found at the scene of a crime.¹⁹⁴ Because the composition of DNA does not vary from cell to cell,¹⁹⁵ the DNA pattern found in a person's blood is identical to that found in the person's hair root or skin tissue.¹⁹⁶ Moreover, because DNA

alleles.

Id.

186. GENETIC WITNESS, *supra* note 7, at 3.

187. For a detailed description of the process of DNA analysis see, Thompson, *supra* note 185, at 26-29; D.H. Kaye, *The Admissibility of DNA Testing*, 13 CARDOZO L. REV 353, 353-57 (1991).

188. Thompson, *supra* note 185, at 26.

189. GENETIC WITNESS, *supra* note 7, at 6.

190. Lee Thaggard, Comment, *DNA Fingerprinting: Overview of The Impact of The Genetic Witness On The American System of Criminal Justice*, 61 MISS. L.J. 423, 424 (1991).

191. GENETIC WITNESS, *supra* note 7, at 23.

Despite the fact that only a few years have passed since DNA evidence was first used in a U.S. criminal proceeding and that several issues, such as technical standards, quality assurance, and civil liberties and privacy concerns, remain to be resolved, interest in implementing DNA typing at the Federal, State, and local levels has skyrocketed. Likewise, forensic applications of DNA analysis have generated excitement in the international law enforcement community.

Id. In fact, one judge has declared, "DNA fingerprinting '[is] the single greatest advance in the search for truth . . . since the advent of cross-examination.'" Kaye, *supra* note 187, at 357 (citing *People v. Wesley*, 533 N.Y.S.2d 643, 644 (Albany County Ct. 1988)).

192. GENETIC WITNESS, *supra* note 7, at 100.

193. *Id.*

194. Sources for DNA evidence include blood, tissue, hair roots, semen, urine, tooth pulp, saliva, and bone marrow. *Id.* at 15.

195. *Id.* at 100.

196. *Id.*

is more stable than other materials and the testing procedures are so sensitive, examiners can analyze even small traces of older or degraded¹⁹⁷ samples.

DNA testing is considered a valuable¹⁹⁸ and integral tool in the investigation and prosecution of crimes¹⁹⁹ and continues to grow as an investigatory method.²⁰⁰ One new area of growth has been in its use by the grand jury. Specifically, the grand jury has become increasingly interested in subpoenaing samples of blood for comparison with evidence gathered by law enforcement officials.²⁰¹

197. GENETIC WITNESS, *supra* note 7, at 100; William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight Of The New Genetic Identification Tests*, 75 VA. L. REV. 45, 51-52 (1989).

198. This is not to say that DNA testing is above reproach. For a discussion about the concerns raised by this investigatory technique, see Thompson, *supra* note 185, at 22 (noting that some courts have ruled DNA evidence inadmissible due to questionable reliability); Thompson & Ford, *supra* note 197, at 45 (describing the problems with prematurely admitting DNA tests before they have been adequately validated); Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465 (1990) (criticizing DNA tests for their lack of scientific accuracy, legal admissibility, and constitutionality).

199. By January 1992, DNA comparisons had been admitted into evidence in approximately 600 cases in every state but North Dakota. Rorie Sherman, *DNA Evidence Dispute Escalates*, NAT'L L.J., Jan. 20, 1992, at 3, col. 1. The Office of Technology Assessment (OTA) of the United States Congress estimates that between 1986 and 1989, DNA tests were used by law enforcement in a minimum of 2,000 investigations in at least 45 states and the District of Columbia. GENETIC WITNESS, *supra* note 7, at 14. By the end of 1991, the FBI had conducted approximately 4,000 DNA tests in criminal cases. *The DNA Wars*, L.A. TIMES, (Magazine), Nov. 29, 1992, at 22. Additionally, state, county, and private labs conducted thousands more such tests. *Id.*

200. The government is undertaking steps to increase the use of DNA testing in the investigation of crimes. The FBI is currently "designing a nationwide databank that would index DNA 'profiles' of convicted offenders, based on DNA samples taken by State law enforcement and correctional authorities." COMM. ON THE JUDICIARY, DNA IDENTIFICATION ACT OF 1993, H.R. REP. NO. 45, 103d Congress, 1st Sess., at 5 (1993) (to accompany H.R. 829). During 1993, Congress considered a bill to authorize funds for the improvement of the quality and availability of such DNA records and for the establishment of a national DNA identification index. It seeks to amend Title I of the Omnibus Crime Control and Safe Streets Act of 1968 to authorize funds to improve DNA records and to establish a DNA identification index. It was introduced in the House on February 4, 1993 and passed on March 29, 1993. On March 3, 1993, Senator Paul Simon introduced the bill in the Senate as S. 497. On that same date, the bill was referred to the Senate Judiciary Committee. The Senate Bill died in Committee. On March 15, 1995, Representative Bill McCollum introduced the DNA Identification Grants Improvement Act of 1995 in the House of Representatives. H.R. 1241, 104th Cong., 1st Sess. (1995). The bill seeks to "improve the capability to analyze deoxyribonucleic acid" by revising the amount of money authorized for DNA identification grants and by establishing an index to "facilitate law enforcement exchange of DNA identification information." *Id.* On that same date, the bill was referred to the House Committee on the Judiciary. No further action has been taken as of this time.

201. See *supra* note 184.

B. A Grand Jury Subpoena for Blood is a Search Under the Fourth Amendment

Although the United States Supreme Court has held that the service of a grand jury subpoena does not involve a Fourth Amendment seizure,²⁰² it has yet to decide whether a subpoena that invades a person's reasonable expectation of privacy encompasses a Fourth Amendment search.²⁰³ In deciding that a subpoena for voice exemplars did not implicate the Fourth Amendment, the Court distinguished between a Government action that required no bodily intrusion and one that did.²⁰⁴ In the former, it found no search had taken place;²⁰⁵ in the latter, it assumed that one had occurred.²⁰⁶

In *Schmerber v. California*²⁰⁷ and *Skinner v. Railway Labor Executives' Association*,²⁰⁸ the Court made it clear that when the Government seeks to compel the extraction and testing of an individual's blood, it has undertaken a search under the Fourth Amendment.²⁰⁹ The Court has stressed that such demands intrude upon "human dignity and privacy which the Fourth Amendment protects."²¹⁰ Although the Court has grown increasingly reluctant to label subpoenas as searches,²¹¹ it has also strongly suggested that Fourth Amendment protections are implicated if a

202. *United States v. Dionisio*, 410 U.S. 1, 9 (1973). Because of this ruling, the remainder of this Article focuses only on whether the compelled extraction of blood by way of a grand jury subpoena constitutes a valid search under the Fourth Amendment. It does not discuss whether the detention needed to obtain the blood from such a recipient is lawful.

203. Lower courts have found that a subpoena that invades a person's reasonable expectation of privacy constitutes a search for Fourth Amendment purposes. *See, e.g.*, *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 222-23 (D.D.C. 1994); *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1198-1205 (W.D. Ky. 1993); *In re Teegardin*, 443 F. Supp. 1273, 1277-78 (D.S.D. 1978).

204. *Dionisio*, 410 U.S. at 14.

The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. . . . The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*.

Id.

205. *See supra* notes 173-78.

206. *See supra* note 204 and accompanying text.

207. 384 U.S. 757, 767 (1966).

208. 489 U.S. 602, 616 (1989).

209. *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493, 1499 (E.D. Wash. 1993); *State v. Olivas*, 856 P.2d 1076, 1081 (Wash. 1993); *State v. Thomas*, 407 S.E.2d 141, 151 (N.C. 1991); *Commonwealth v. Downey*, 553 N.E.2d 1303, 1306 (Mass. 1990).

210. *Schmerber*, 384 U.S. at 769-70.

211. *See supra* notes 118-51 and accompanying text.

subpoena violates one's reasonable expectation of privacy.²¹² The Court has explicitly declared that when the Government demands a sample of a person's blood for analysis, it seeks to invade one's "reasonable expectation of privacy."²¹³

Every court that has examined the constitutionality of a subpoena for blood has found that it involves a search under the Fourth Amendment.²¹⁴ They have considered it irrelevant whether this governmental action comes as a result of a warrant or a subpoena, because the result is the same.²¹⁵ compelled invasion of a person's body by the government.²¹⁶ Consequently they have found that this Government action, whether by warrant or subpoena, constitutes a search under the Fourth Amendment.²¹⁷ Additionally, the subsequent governmental analysis of the blood constitutes a separate Fourth Amendment search of the person because it further invades that person's reasonable expectation of privacy.²¹⁸

C. *The Constitutional Reasonableness of a Grand Jury Subpoena for Blood*

Once a court has decided that a subpoena for blood extraction involves a Fourth Amendment search, it must then determine whether the search is "reasonable"²¹⁹ under the Amendment.²²⁰ Traditionally, the Supreme

212. *United States v. Dionisio*, 410 U.S. 1, 8 (1973).

213. *Schmerber*, 384 U.S. at 767; *see also*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); 1 LAFAVE, *supra* note 180, § 2.6(b), at 463 (footnotes omitted); James G. Cavoli, Comment, *Can the Government Get Into Your Genes? A Proposed New York Statute for the Use of Genetic Identification to Establish Probable Cause*, 55 ALB. L. REV. 1355, 1392-93 (1992).

214. *In re Grand Jury* (T.S.), 816 F.Supp. 1196, 1199 (W.D.Ky. 1993); *Henry v. Ryan*, 775 F. Supp. 247, 253 (N.D.Ill. 1991); *Grand Jury v. Marquez*, 604 N.E.2d 929, 933 (Ill. 1992); *Woolverton v. Grand Jury*, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993).

215. *Schmerber*, 384 U.S. at 767-68; *see also* *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment [the Fourth], as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

216. *United States v. Davenport*, No. 89-5461, 1990 WL 116742, at * 2 (4th Cir. July 26, 1990).

Blood tests of criminal defendants performed for evidentiary reasons have been designated 'searches' under the Fourth Amendment by the Supreme Court, and thus are subject to the warrant requirement. . . . Therefore, a warrant or court order for a blood test must be supported by a sworn affidavit or oath to be valid. *Id.* (citation omitted); *Commonwealth v. Downey*, 553 N.E.2d 1303, 1306 (Mass. 1990) ("An order compelling the production of a blood sample is an intrusion that implicates protections provided by the Fourth Amendment to the United States Constitution.").

217. *See In re Grand Jury* (T. S.), 816 F. Supp. at 1198; *Henry*, 775 F. Supp. at 264; *Marquez*, 604 N.E.2d at 935.

218. *Skinner*, 489 U.S. at 616; Cavoli, *supra* note 213, at 1395.

219. U.S. CONST. amend. IV ("The right of the people to be secure in their persons,

Court has looked to the Warrant Clause of the Fourth Amendment²²¹ to define reasonableness. Relying on this clause, the Court decided whether a governmental search was lawful by examining whether it was preceded by a valid judicial warrant²²² supported by probable cause.²²³

I. Exigent Circumstances.—When faced with exigent circumstances, the Government may conduct a search without a warrant. In *Schmerber v. California*, the Court found that under the circumstances, compelled blood extraction from a person arrested for Driving Under the Influence was reasonable.²²⁴ First, it found that probable cause clearly existed for arresting Schmerber and for charging him with this offense²²⁵ as well as for searching him.

These facts alone would not, however, justify a warrantless search. It was necessary to determine whether the police were permitted to dispense with prior judicial approval before invading Schmerber's body and

houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated. . . .") (emphasis added).

220. *Skinner*, 489 U.S. at 618 ("To hold that the Fourth Amendment is applicable . . . is only to begin the inquiry into the standards governing such intrusions. For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.") (citations omitted).

221. U.S. CONST. amend. IV ("[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

222. *Katz v. United States*, 389 U.S. 347, 357 (1967); see also *Skinner*, 489 U.S. at 619.

223. The Court has defined probable cause as follows:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Brinegar v. United States, 338 U.S. 160, 175 (1949). Probable cause to search exists "where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that'" objects subject to seizure are located at the place to be searched. *Id.* at 175-76.

224. *Schmerber v. California*, 384 U.S. 757, 771 (1966).

225. *Id.* at 768-69. The Court made it clear, however, that this was not a search incident to arrest and that the valid arrest of the defendant did not in itself justify the warrantless search:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the *mere chance* that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769-70 (emphasis added).

extracting his blood.²²⁶ The Court found that because alcohol in the blood diminishes over time, the officers had to act immediately.²²⁷ Since the police were justifiably concerned with the possible loss of evanescent evidence if they took the time to seek a judicial warrant, the Court concluded that there was an exigency which made it reasonable to dispense with the warrant requirement.²²⁸

The Court also ruled that the blood test used was reasonable.²²⁹ It recognized that blood tests are an effective way to determine one's blood-alcohol level²³⁰ and that they are commonly done with little risk or pain.²³¹ Furthermore, the test was performed in a reasonable manner²³² by a hospital physician²³³ who conducted it under accepted medical standards.²³⁴ The Court, therefore, concluded that a warrantless extraction of blood from a criminal defendant, not just a potential suspect, is reasonable only if there is a "clear indication"²³⁵ that the extraction will produce evidence of the alleged crime,²³⁶ if there are exigent circumstances demanding the immediate extraction of the blood before the police can secure a warrant,²³⁷ and if the test is reasonable²³⁸ and is conducted in a reasonable manner.²³⁹ In the matter of bodily invasions for criminal investigatory purposes, the Court later stressed that if there are no exigent circumstances, not only will it evaluate reasonableness on the basis of whether there was a valid probable cause warrant, but it will also consider the degree of the intrusion involved and the need for the intrusion.²⁴⁰

226. *Id.* at 770.

227. *Id.* at 770-71.

228. *Id.*

229. *Id.* at 771.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. One commentator has suggested that the requirement of a "clear indication" demands a higher quantum of proof than probable cause. 2 LAFAVE, *supra* note 180, § 4.1(d), at 129-30. *But see* United States v. Montoya De Hernandez, 473 U.S. 531, 540 (1985) (declaring that the term "clear indication" as used in *Schmerber* required the finding of "necessity for particularized suspicion that the evidence sought might be found within the body of the individual").

236. *Schmerber*, 384 U.S. at 769-70.

237. *Id.* at 770.

238. *Id.* at 771.

239. *Id.*

240. *Winston v. Lee*, 470 U.S. 753, 760-62 (1985); *see also* *Cupp v. Murphy*, 412 U.S. 291 (1973) (holding that the warrantless scraping of the defendant's fingernails did not violate the Constitution). The Court first ruled that this procedure did constitute a search under the Fourth Amendment:

2. *Reasonable Suspicion*.—The Court has also decided that when obtaining a warrant is impractical or impossible and the search is narrow in scope, it will permit a search on less than probable cause but on more than a mere hunch—it will allow a limited intrusion based on “reasonable suspicion.”²⁴¹ Using a balancing test to determine the reasonableness of the intrusion,²⁴² a court must examine the type of search involved, the context in which it was performed and the Government’s need to conduct it.²⁴³ If the court concludes that there is a significant need for the search and the search results in only a limited intrusion upon a person’s privacy, the Court will permit it on the basis of reasonable suspicion²⁴⁴ rather than probable cause.²⁴⁵

The Court has not decided whether in circumstances different from those in *Schmerber* it would permit the compelled extraction of blood from a criminal suspect under a reasonable suspicion standard. In dicta, however, the Court has indicated on two occasions²⁴⁶ that it may consider a detention for another identification technique to be constitutional, even if done on the basis of reasonable suspicion rather than probable cause.²⁴⁷

The inquiry does not end here, however, because Murphy was subjected to a search as well as a seizure of his person. Unlike the fingerprinting in *Davis*, the voice exemplar obtained in *United States v. Dionisio*, *supra*, or the handwriting exemplar obtained in *United States v. Mara*, the search of the respondent’s fingernails went beyond mere ‘physical characteristics . . . constantly exposed to the public’. . . and constituted the type of ‘severe, though brief, intrusion upon cherished personal security’ that is subject to constitutional scrutiny.

Id. at 295 (citations omitted). Nonetheless, the Court found that this search was permissible as one incident to arrest: “On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments.” *Id.* at 296 (citations omitted).

241. The Court has defined “reasonable suspicion” as “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

242. *Terry*, 392 U.S. at 20-21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967)).

243. *Id.* at 21. *See also* *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989).

244. *Terry*, 392 U.S. at 27.

245. Since the decision in *Terry*, the Court has permitted a myriad of government intrusions based on reasonable suspicion rather than probable cause. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (holding that roving border patrol cars may stop vehicles and question occupants on the basis of reasonable suspicion); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (finding that a vehicle may be stopped for a license check if the officer has a reasonable suspicion that the driver is unlicensed or the car is not registered); *Michigan v. Long*, 463 U.S. 1032, 1032 (1983) (stating that a protective search of a car’s interior may be conducted if the officer has a reasonable suspicion that the car contains a weapon).

246. *Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985).

247. *Cavoli*, *supra* note 213 at 1373-76; Comment, Sally E. Renskers, *Trial by Certainty*:

In *Davis v. Mississippi*²⁴⁸ and again in *Hayes v. Florida*,²⁴⁹ the Court suggested that detaining a suspect for fingerprinting may be permissible on the basis of reasonable suspicion. The Court reached this conclusion for a number of reasons. First, it distinguished fingerprinting from other police searches because the former does not involve "the probing into an individual's private life and thoughts."²⁵⁰ It reasoned that fingerprinting could not be done repeatedly to harass the suspect, as only one set of prints is required for analysis.²⁵¹ Furthermore, the Court viewed fingerprinting as a more reliable and effective crime-solving tool than confessions or eyewitness identifications.²⁵² Finally, the procedure could be done with notice²⁵³ because the suspect could not destroy²⁵⁴ his fingerprints.²⁵⁵

Implications of Genetic DNA Fingerprints, 39 Emory L.J. 309, 329 (1990).

248. 394 U.S. 721 (1969).

249. 470 U.S. 811 (1985).

250. *Davis*, 394 U.S. at 727.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. As a result of the Court's decision in *Davis*, on October 7, 1969, Senator McClellan introduced a bill in the Senate entitled *Detention for Obtaining Evidence of Identifying Physical Characteristics*. P. Michael Drake, Comment, *Detention for Taking Physical Evidence Without Probable Cause*, 14 ARIZ. L. REV. 132, 144 (1972). Pursuant to this proposed legislation, upon a showing of reasonable suspicion by police officers, a federal judge would be authorized to issue an order requiring the person named to appear before a magistrate, for a maximum of five hours, to provide identifying physical evidence such as fingerprints, hair, or blood. *Id.* That bill died in Committee. *United States v. Holland*, 552 F.2d 667, 673 (5th Cir. 1977).

On March 31, 1971, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States drafted Rule 41.1, a proposed Amendment to the Federal Rules of Criminal Procedure to authorize the issuance of "nontestimonial identification orders" by federal magistrates. 52 F.R.D. 409, 462 (1971). Upon request from a federal prosecutor or agent, the magistrate could issue such an order if the request was supported by an affidavit setting forth: (1) probable cause to believe that an offense had been committed; (2) "reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense;" and (3) that the results of these identification orders would materially aid in determining whether the suspect committed the offense. *Id.* at 463 (emphasis added). The nontestimonial procedures covered by this proposed rule included: "fingerprints, palm prints, footprints, measurements, handwriting exemplars, voice samples, photographs, line-ups, as well as urine, saliva, hair, and blood samples." *Id.* at 466-67 (emphasis added). The Judicial Conference "specifically did not approve the proposed Rule." *Holland*, 552 F.2d at 673-74. Interestingly, the Committee drew no distinction between the procedure of extracting blood versus the taking of voice or handwriting exemplars. Although the Supreme Court has applied different legal standards to these types of procedures, the Committee included both procedures in its proposed amendment to the Rules and suggested that reasonable suspicion for taking the specimens would suffice.

There are some similarities between the identification procedure of fingerprinting and that of DNA blood testing. Like fingerprinting, only one sample is needed to conduct the DNA analysis.²⁵⁶ Additionally, some experts argue that DNA testing is a highly reliable and effective crime-solving technique.²⁵⁷ Moreover, because DNA can not be altered or destroyed,²⁵⁸ the recipient could have notice of the demand for the blood sample.²⁵⁹

On the other hand, there are significant differences between taking fingerprints and extracting blood. Fingerprints are, of course, constantly visible to the public, and it has been held that there is no privacy expectation in what a person constantly exposes to the public.²⁶⁰ Consequently, it could be argued that the *taking* of prints does not constitute a Fourth Amendment search²⁶¹ because fingerprints, like a person's voice²⁶² or a person's handwriting,²⁶³ are always on public view and therefore carry no privacy expectation.²⁶⁴ Conversely, the Court has repeatedly stressed that a person does have a reasonable expectation of privacy in his

Schmerber v. California, 384 U.S. 757, 768-69 (1966) (holding that the taking of blood constitutes a search which requires at least probable cause and exigent circumstances); United States v. Dionisio, 410 U.S. 1, 14-15 (1973) (holding that voice exemplars do not constitute a Fourth Amendment search); United States v. Mara, 410 U.S. 19, 21-22 (1973) (holding that handwriting exemplars do not constitute a Fourth Amendment search); Note, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 MINN. L. REV. 667, 691 (1972).

For a thorough discussion of this proposed amendment to the Rules, see Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712 (1972); Note, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 MINN. L. REV. 667 (1972).

256. Clare M. Tande, Note, *DNA Typing: A New Investigatory Tool*, 1989 DUKE L.J. 474, 492 (1989).

257. See *supra* text accompanying notes 191-97.

258. Tande, *supra* note 256 at 492; Dan L. Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 JURIMETRICS J. 455, 470 (1988) ("Unlike blood alcohol levels . . . DNA restriction fragment patterns do not diminish over time.").

259. Tande, *supra* note 256, at 492.

260. Hoeffel, *supra* note 198, at 530-31.

261. 1 LAFAVE, *supra* note 180, § 2.6(a), at 462 (footnotes omitted).

262. United States v. Dionisio, 410 U.S. 1, 14 (1973).

263. United States v. Mara, 410 U.S. 19, 21 (1973).

264. See also *In re Grand Jury (Mills)*, 686 F.2d 135, 139 (3d Cir. 1982) (ruling that a grand jury subpoena for scalp and facial hairs did not constitute a search under the Fourth Amendment because a person does not have an expectation of privacy in that which he knowingly exposes to the public). In *In re Grand Jury (Mills)*, the court likened the taking of hair samples to the taking of fingerprints and voice exemplars and found that none of these processes implicate the Fourth Amendment. *Id.*; see also United States v. Boykins, 966 F.2d 1240, 1243 (8th Cir. 1992) (holding that a subpoena for fingerprints does not violate the Fourth Amendment).

blood.²⁶⁵ Similarly, fingerprinting is non-invasive; drawing blood is invasive. Likewise, fingerprints reveal nothing more than that—a fingerprint—whereas blood samples may reveal highly confidential information such as medical conditions and genetic disorders.²⁶⁶ These critical differences establish that the withdrawal of blood, as compared to the taking of fingerprints, deserves heightened constitutional protection because it is more physically invasive and more personally intrusive.²⁶⁷

Additionally, while *Davis* and *Hayes* discuss the process of fingerprinting, they address only the issue of whether a seizure to conduct this procedure may be done on less than probable cause and, if so, what criteria may be used to hold someone for this procedure.²⁶⁸ Neither case addresses whether fingerprinting itself even constitutes a search under the Fourth Amendment, let alone what standard would be used to evaluate its reasonableness.²⁶⁹ Since the Court has already determined that a grand jury subpoena does not entail a Fourth Amendment seizure,²⁷⁰ these two cases are not dispositive on the standard that should be used to evaluate a search for blood.

3. “*Special Needs.*”—In *Skinner v. Railway Labor Executives Association*²⁷¹ the Court relied on the “special needs”²⁷² doctrine to

265. See *supra* notes 207-10 and accompanying text.

266. Hoeffel, *supra* note 198, at 531.

267. As one commentator noted, “There may be a serious question as to whether the taking of a blood sample should be allowed in this setting [pursuant to the *Davis* dictum about fingerprinting], for the Supreme Court has viewed any search ‘involving intrusions beyond the body’s surface’ as a much more serious matter.” 3 LAFAVE, *supra* note 180, § 9.6(b), at 573 (footnotes omitted). See also Hoeffel, *supra* note 198, at 532-33.

268. See 3 LAFAVE, *supra* note 180, § 9.6(b), at 571-73 (footnotes omitted).

269. *Id.* at 572-73 (footnotes omitted).

270. See *supra* notes 168-72 and accompanying text.

271. For a thorough analysis of *Skinner*, see William R. Hodkin, *Rethinking Skinner and Von Raab: Reasonableness Requires Individualized Suspicion for Employee Drug Testing*, 17 J. CONTEMP. L. 129 (1991); Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the ‘Special Needs’ Doctrine?* 56 BROOK. L. REV. 1013 (1990); Heidi P. Mallory, Note, *Fourth Amendment—The ‘Reasonableness’ Of Suspicionless Drug Testing of Railroad Employees*, 80 J. CRIM. L. & CRIMINOLOGY 1052 (1990).

272. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619-20 (1989).

Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. We have recognized exceptions to this rule, however, when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. . . . The Government’s interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or

uphold Federal Railway Administration (FRA) regulations that permitted suspicionless blood, breath, and urine analysis of railway workers to detect drug use. Although the Court found that these tests constituted searches under the Fourth Amendment,²⁷³ it concluded that they were conducted for the “special need” of deterring alcohol and drug use on the job,²⁷⁴ and not for the usual law enforcement purpose of criminal prosecution.²⁷⁵ Because of these “special needs,” the Court balanced the Government’s interests against those of the individual to determine whether it was impractical to require either a probable cause warrant or an individualized suspicion before conducting this search.²⁷⁶

The Court decided that obtaining a warrant based on probable cause was unnecessary under the circumstances of this testing program.²⁷⁷ Because the regulations clearly delineated when and upon whom these tests could be conducted,²⁷⁸ there was no need for a magistrate to make this determination.²⁷⁹ The Court also found that requiring the railway supervisor to obtain a warrant would frustrate the purpose of the program.²⁸⁰ As in *Schmerber*, the Court recognized that traces of drugs and alcohol disappear from the bloodstream over the passage of time.²⁸¹ Immediate testing, without the time-consuming process of obtaining a warrant, prevented the loss of crucial evidence.²⁸² Additionally, the Court declared that it was unfair to burden the supervisors with a warrant requirement when they were unfamiliar with the subtleties of constitutional criminal procedure.²⁸³

The Court also rejected the need for reasonable suspicion before performing these tests.²⁸⁴ The Court balanced the interests of the person against those of the Government and found that the intrusion on the person’s privacy was limited, while the Government’s interest was

regulated industries, or its operation of a government office, school, or prison, “likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”

Id. (citations omitted).

273. *Id.* at 617.

274. *Id.* at 620-21.

275. *Id.*

276. *Id.* at 621.

277. *Id.* at 624.

278. *Id.* at 622.

279. *Id.*

280. *Id.* at 623.

281. *Id.* at 623.

282. *Id.*

283. *Id.* at 623-24.

284. *Id.* at 624.

compelling.²⁸⁵ The Court declared that blood tests require only a small quantity of blood and are commonplace, minimally intrusive,²⁸⁶ and relatively painless.²⁸⁷ Moreover, the employees' expectations of privacy are reduced because they work in a heavily regulated industry that limits their freedom of movement.²⁸⁸

On the other hand, the Government had a compelling interest in conducting these tests without the prerequisite of individualized suspicion.²⁸⁹ According to the Court, testing employees was imperative to deter drug or alcohol abuse by the workers.²⁹⁰ It was also necessary to prevent train accidents or to determine their cause if they occurred.²⁹¹ But detecting one who is impaired by alcohol or drugs is very difficult.²⁹² For example, it would be particularly troublesome to do so in the chaotic aftermath of an accident.²⁹³ The Court reasoned that requiring the supervisor to establish an individualized suspicion of the employee's impairment *before* allowing testing would seriously frustrate the goal of these regulations.²⁹⁴ The Court, therefore, ruled that the compelling interests of the Government outweighed the minimal privacy interests of the employees²⁹⁵ and held that the supervisors did not need to establish individualized suspicion before testing a particular employee.²⁹⁶

The Court decided that in view of the "special needs" in this case, it would simply balance the government's interests against the private interests to determine the reasonableness of the search.²⁹⁷ It found that the government's interest, which it viewed as "compelling,"²⁹⁸ outweighed²⁹⁹ the intrusion on the individual, which it viewed as "limit-

285. *Id.*

286. *Id.* at 625.

287. *Id.*

288. *Id.* at 624-25, 627.

289. *Id.* at 628.

290. *Id.* at 629-30.

291. *Id.* at 630.

292. *Id.* at 628.

293. *Id.* at 631.

294. *Id.*

295. *Id.* at 633.

296. In a companion case, the Court held that the warrantless, suspicionless drug testing of Customs Service employees did not violate the Fourth Amendment. Relying again on the "special needs" doctrine and using the same analysis as in *Skinner*, the Court found constitutionally reasonable the compelled urinalyses of Customs employees who sought promotions or transfers to positions which required them to carry guns, or interdict drugs. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-72 (1989).

297. *Skinner*, 489 U.S. at 619.

298. *Id.* at 633.

299. *Id.*

ed.”³⁰⁰ Consequently, the Court held that the regulations authorized a reasonable search³⁰¹ under the Fourth Amendment.³⁰²

The “special needs” doctrine of *Skinner* should not be used to evaluate the reasonableness of a grand jury subpoena for blood.³⁰³ The extraction of blood constituted a “special need” in *Skinner* because the search was not undertaken for ordinary law enforcement objectives, but rather for civil regulatory purposes.³⁰⁴ Conversely, a grand jury subpoena is used for traditional law enforcement purposes.³⁰⁵ With a subpoena, the Government is investigating a crime³⁰⁶ and seeking to indict a perpetrator.³⁰⁷ Certainly these are ordinary law enforcement purposes.

Additionally, the Court reasoned that railway workers have a diminished expectation of privacy because they choose to work in a heavily regulated industry.³⁰⁸ In contrast, a recipient of a grand jury subpoena does not necessarily have a similarly diminished privacy expectation.³⁰⁹

300. *Id.* at 628.

301. *Id.* at 634.

302. *Id.* But see *Acton v. Vernonia School Dist.*, 23 F.3d 1514, 1526 (9th Cir. 1994) (deciding that suspicionless drug testing of student athletes violated both the Fourth Amendment and Article I, § 9 of the Oregon Constitution), *cert. granted*, *Vernonia School Dist. v. Acton*, 115 S. Ct. 571 (1994); *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (ruling that suspicionless drug testing of student athletes by the University of Colorado violated the Fourth Amendment), *cert. denied*, 114 S. Ct. 1646 (1994). Although the court decided that this was a “special needs” case because the drug testing program was not designed to serve the “ordinary needs of law enforcement,” *id.* at 936, the court balanced the governmental interests of this program against the private interests involved, and concluded that the former did not outweigh the latter. *Id.* at 946. See also *Portillo v. United States Dist. Court for the Dist. of Ariz.*, 15 F.3d 819 (9th Cir. 1994) (holding that a general order that authorized probation officers to require defendants awaiting sentencing to undergo urine testing violated the Fourth Amendment). The Ninth Circuit recognized that the “operation of a probation system presents ‘special needs, beyond the normal need for law enforcement that may justify departures from the usual warrant and probable-cause requirements.’” *Id.* at 822 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 876-78 (1987)). Consequently, it balanced the Government’s “significant interest in determining the appropriate sentencing alternative for a defendant . . . against . . . the defendant’s privacy interest.” *Id.* at 823 (citation omitted). It found that the defendant’s expectation of privacy required the government to exercise “some degree of reasonableness” in performing this search. *Id.* at 824. Since the record did not include any such showing, the Ninth Circuit held that this search was unconstitutional. *Id.*

303. In one of the few decisions on the constitutionality of a grand jury subpoena demanding a sample of blood, the United States District Court for the Northern District of Illinois, rejected the use of the “special needs” doctrine to evaluate the reasonableness of such a subpoena. *Henry v. Ryan*, 775 F. Supp. 247, 254 n.6 (N.D. Ill. 1991). For a discussion of this decision, see *infra* notes 332-52 and accompanying text.

304. *Skinner*, 489 U.S. at 619-21.

305. See *supra* notes 77-78 and accompanying text.

306. See *supra* note 24 and accompanying text.

307. See *supra* note 25 and accompanying text.

308. *Skinner*, 489 U.S. at 624-25.

309. *In re Grand Jury (T.S.)*, 816 F. Supp. 1196, 1204 (W.D. Ky. 1993); *Henry v. Ryan*,

Unlike the railway worker, the subpoena recipient ordinarily has not chosen to work in a heavily regulated industry, has not submitted to any restrictions on personal security or privacy, and has taken no steps to submit to invasive procedures.³¹⁰ Consequently, the “special needs” doctrine could not be used to constitutionally validate a grand jury subpoena for blood.³¹¹

4. *Balancing Interests.*—In certain limited instances, even in the absence of “special needs,” the Court has upheld a criminal investigatory

775 F. Supp. 247, 254 n.6 (N.D. Ill. 1991).

310. *In re Grand Jury* (T.S.), 816 F. Supp. at 1204; *Henry*, 775 F. Supp. at 254 n.6.

311. *In re Grand Jury* (T. S.), 816 F. Supp. at 1204-05. *See also* *King v. Ryan*, 607 N.E.2d 154 (Ill. 1992) (invalidating a state statute that authorized the chemical testing of drivers involved in accidents resulting in death or personal injury). Since the statute did not require a probable cause determination that the driver was under the influence of drugs or alcohol before conducting this testing, the court ruled that this statute violated the Fourth Amendment. It refused to apply the “special needs” doctrine because the testing was for criminal prosecution, not for the “special need” of regulating conduct. *Id.* at 160. Furthermore, the drivers tested under this statute did not have a diminished expectation of privacy as did the railway workers in *Skinner*. *Id.* *See also* *Commonwealth v. Kohl*, 615 A.2d 308, 314 (Pa. 1992) (refusing to use the “special needs” doctrine to uphold a state statute that permitted the chemical testing of drivers involved in accidents).

But see *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C. 1994) (applying the “special needs” doctrine to determine the reasonableness of a congressional subpoena served upon Senator Bob Packwood for his personal diaries). When Senator Packwood challenged the subpoena on Fourth Amendment grounds, the judge held that the subpoena called for a search. Without explanation, however, the court relied on the “special needs” case of *O'Connor v. Ortega*, to evaluate the reasonableness of that subpoena. *Packwood*, 845 F. Supp. at 22 (citing *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987)). The *O'Connor* court stated, “In sum, we conclude that the ‘special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable’, for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct.” *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (citation omitted). Consequently, the court weighed “the nature and quality of the intrusion on [Packwood’s] Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,” and decided that the subpoena did not violate the Senator’s Fourth Amendment rights. *Packwood*, 845 F. Supp. at 22.

In denying the Senator’s application to the United States Supreme Court for a stay pending appeal, Chief Justice Rehnquist noted that in order to decide whether the subpoena violated the Senator’s Fourth Amendment rights, the District Court had balanced Packwood’s interest in privacy against the Government’s interest in obtaining the material. Because the Senator had not challenged the use of this legal standard, however, the Chief Justice did not comment upon the lower court’s reliance on it. *Packwood v. Senate Select Comm. on Ethics*, 114 S. Ct. 1036, 1038 (1994). In light of Supreme Court precedent, the District Court’s reliance on the “special needs” doctrine in the *Packwood* case is not misplaced. This was a civil matter—a Senate Ethics Committee investigation—into Packwood’s alleged misconduct on the job. It was not a criminal investigation in which a demand for evidence was being made to possibly charge Packwood with criminal offenses.

seizure where less than reasonable suspicion was present.³¹² In cases where the intrusion on the person is minimal³¹³ and the need for official action is compelling,³¹⁴ the Court has abandoned the standard of reasonable suspicion and has employed a balancing test to determine the reasonableness of the challenged action.³¹⁵ The Court weighs the persons's interest against that of the Government.³¹⁶ It permits a minimal seizure, even in the absence of individualized suspicion, when the Government seeks to accomplish a significant goal and the challenged action advances that goal.³¹⁷

For a number of reasons, this approach should not be used in the case of a compelled intrusion into the body.³¹⁸ First, this approach has been used only to examine the reasonableness of a seizure, but not a search.³¹⁹ It has been used only in cases where the degree of intrusion was viewed as "slight"³²⁰ and the Government interest was compelling.³²¹

In contrast, with respect to a subpoena for blood, the Court must examine the reasonableness of a search not a seizure.³²² The Court has distinguished a search from a seizure and indicated that the former deserves heightened Fourth Amendment protection.³²³ The degree of an intrusion

312. See, e.g., *Michigan v. Sitz*, 496 U.S. 444 (1990) (allowing checkpoints to detect drunk drivers since the state's interest is high and the intrusion of personal liberty is minimal); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (giving deference to the discretion of higher ranking officials when the intrusion is minimal).

313. *Sitz*, 496 U.S. at 451; see also *Martinez-Fuerte*, 428 U.S. at 557-58 (stating that routine checkpoints do not intrude on the right to "free passage without interruption").

314. *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 557.

315. *Sitz*, 496 U.S. at 449-50; *Martinez-Fuerte*, 428 U.S. at 555.

316. *Sitz*, 496 U.S. at 449-50; *Martinez-Fuerte*, 428 U.S. at 555.

317. *Sitz*, 496 U.S. at 455; *Martinez-Fuerte*, 428 U.S. at 556-58.

318. But see *People v. Wheeler*, 636 N.E.2d 1129, 1135 (Ill. App. Ct. 1994) (ruling that a statute mandating that blood and saliva samples be taken from convicted sexual offenders should be evaluated by balancing "the government's interest in conducting the search, the degree to which the search actually advances that interest, and the gravity of the intrusion upon personal privacy"). Using this approach, the court found that the statute did not violate the Fourth Amendment. *Id.*

319. E.g., *Martinez-Fuerte*, 428 U.S. at 561; see also *Sitz*, 496 U.S. at 450.

320. See, e.g., *Sitz*, 496 U.S. at 451 ("[T]he measure of the intrusion on motorists stopped briefly at sobriety checkpoints . . . is slight."); see also *Martinez-Fuerte*, 428 U.S. at 557 ("[T]he consequent intrusion on Fourth Amendment interests is quite limited.").

321. *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 556.

322. See *infra* text accompanying note 330; see also *infra* text accompanying note 331.

323. See, e.g., *Martinez-Fuerte*, 428 U.S. at 561 ("We think the same conclusion is appropriate here, where we deal neither with searches, nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection."); see also *Segura v. United States*, 468 U.S. 796, 810 (1984) (plurality decision) ("A seizure affects only the person's possessory interests; a search affects a person's privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a seizure of

for blood may not be viewed as "slight" because it implicates the "most personal and deep-rooted expectations of privacy,"³²⁴ namely, the privacy of a person's own body.³²⁵ The Government's interest in this case is the same as it is in any criminal investigation—seeking evidence to solve a crime. Unlike an immigration³²⁶ or sobriety checkpoint,³²⁷ where the Court evaluated the reasonableness of such seizures by using a balancing test, a subpoena for a sample of blood does not involve a pervasive, institutionalized scheme. It merely concerns the resolution of one particular offense. This does not constitute the compelling societal interest found in the cases³²⁸ where the balancing approach was used.³²⁹

D. The Lower Courts' Examination of a Grand Jury Subpoena to Extract Blood

Only a few courts have examined the issue of whether a grand jury subpoena for a blood sample constitutes an unconstitutional search.³³⁰ The courts agree that the extraction of blood constitutes a search under the Fourth Amendment.³³¹ They disagree, however, on the standard that should be used to evaluate the reasonableness of the search.

In the first published³³² opinion on the issue,³³³ the United States

premises, not a search, is at issue.") (Burger, C.J. & O'Connor, J., concurring).

324. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

325. *Id.*

326. *Martinez-Fuerte*, 428 U.S. at 543.

327. *Michigan v. Sitz*, 496 U.S. 444 (1990).

328. *Id.*; *Martinez-Fuerte*, 428 U.S. at 543.

329. *But see In re Teegardin*, 443 F. Supp. 1273, 1277-78 (D.S.D. 1978). The court ruled that if it were to enforce the subpoena, the Government would have to show that: (1) the grand jury's investigation was authorized by law; (2) the investigation was proceeding according to a legitimate purpose; (3) the items sought were relevant to the investigation; and (4) the intrusion into the Fourth Amendment was reasonable under the circumstances. *Id.* To determine reasonableness, the court would balance the interests of the public in a thorough investigation against the inconvenience to the witness. *Id.* In this case, the court concluded that although the subpoena was inconvenient and bothersome, it was not oppressive or unreasonable. *Id.* Because a subpoena for blood is more invasive and revealing, however, it is not comparable to one for financial records. *See infra* notes 421-22 & 440-46 and accompanying text.

330. *United States v. Under Seal*, No. 86-5134, 1987 WL 37526, at *2 (4th Cir. May 21, 1987); *In re Grand Jury* (T. S.), 816 F. Supp. 1196, 1200-06 (W.D. Ky. 1993); *Henry v. Ryan*, 775 F. Supp. 247, 253-56 (N.D. Ill. 1991); *Woolverton v. Grand Jury*, 859 P. 2d 1112, 1114-16 (Okla. Crim. App. 1993). Other courts may have reviewed the issue, but have not published opinions of their decisions. *See, e.g., supra* note 183 and accompanying text.

331. *See infra* notes 350, 354 & 404 and accompanying text.

332. In 1987, the Fourth Circuit issued an unpublished, per curiam decision on the constitutionality of a subpoena for blood. *Under Seal*, No. 86-5134, 1987 WL 37526 (4th Cir. May 21, 1987). In that case, a South Carolina prison inmate received a federal grand jury

District Court for the Northern District of Illinois ruled that a subpoena for the extraction of blood constitutes a search under the Fourth Amendment³³⁴ that must be supported by only reasonable suspicion.³³⁵

The facts of *Henry v. Ryan* are uncontroverted. DuPage County Deputy Sheriff George Wick was investigating a possible murder. Although he did not suspect Dana Henry, Wick called Henry and asked him to come to his office to answer some questions.³³⁶ Henry complied. One week later, Wick called Henry again and asked him to come to the office to provide blood and saliva samples. Henry refused.

The sheriff then served Henry with a grand jury subpoena demanding that he provide the samples. Henry moved to quash the subpoena, but the court denied the motion and ordered Henry to comply. He again refused. The court held him in contempt and ordered him incarcerated until he complied.

When Henry was booked into jail, he was found to be suicidal. Consequently, all his clothes were taken from him and he was placed naked and alone in an observation cell.³³⁷ After eight hours in the cell, Henry relented and provided the samples.³³⁸ Henry was never arrested or charged in connection with this investigation.³³⁹

As a result of his experience, Henry filed a lawsuit under 42 U.S.C. § 1983 alleging that the County, the Sheriff, and other government officials

subpoena demanding a sample of his blood. The Court of Appeals found that the lower court had "authority to authorize reasonable force" to obtain the sample because the witness was already incarcerated. *Id.* at *1. Additionally the court upheld the district court's order for the sample because it was "a routine, minimal physical intrusion" that allowed "the grand jury to obtain . . . highly relevant and probative [evidence]." *Id.*

Certainly the standard used to evaluate the taking of a sample from an incarcerated person should differ substantially from that used to judge the intrusion on a free individual. *See Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) (holding that because an incarcerated felon has only limited constitutional rights, the Fourth Amendment does not demand a finding of either probable cause or reasonable suspicion before blood can be drawn from him); *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) (holding that the compelled drawing of a blood specimen from a prison inmate may be done for a "legitimate penological objective"); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493, 1500. (E.D. Wash. 1993) (holding that no showing of probable cause or reasonable suspicion must be made to extract an inmate's blood, but that the Government must show "evidence of a legitimate penological objective for that type of search").

333. *Henry*, 775 F. Supp. at 247.

334. *Id.* at 253.

335. *Id.* at 254.

336. *Id.* at 249.

337. *Id.*

338. *Id.*

339. *Id.* at 250.

violated his civil rights.³⁴⁰ The defendants moved to dismiss the complaint on a number of grounds, including that the subpoena did not violate Henry's rights under the Fourth Amendment.³⁴¹ The court denied the motion.³⁴²

In reaching its decision, the court first concluded that the extraction of blood and saliva constituted a search under the Fourth Amendment.³⁴³ The court then considered whether the search was reasonable.³⁴⁴ Although conceding that reliance on *Schmerber* would lead to the conclusion that "probable cause is a necessary element of a grand jury subpoena compelling a bodily intrusion,"³⁴⁵ the court nonetheless found that such a requirement is "untenable in the grand jury situation,"³⁴⁶ because the very "purpose of a grand jury is to determine whether there is probable cause to charge an individual with a crime."³⁴⁷ According to the court, it would be "inconsistent" to demand that a grand jury establish probable cause to search while it was investigating whether there was probable cause to indict.³⁴⁸

Yet the court realized that the power of the grand jury is not unlimited and that the "evidence collected by a grand jury must still be relevant and particularized."³⁴⁹ While rejecting a probable cause standard, the court concluded that in order to ensure that evidence sought is both relevant and particularized, the lesser standard of reasonable suspicion³⁵⁰ should be applied to such subpoenas.³⁵¹ Since there was a possibility that no individualized suspicion supported this subpoena, the court refused to dismiss the complaint.³⁵²

Two years later, the United States District Court for the Western

340. *Id.*

341. *Id.* at 252.

342. *Id.* at 255.

343. *Id.* at 253.

344. *Id.*

345. *Henry*, 775 F. Supp. at 254.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. The court specifically rejected the use of the "special needs" doctrine because the subpoena did not involve the civil matter of "employee drug-testing." Nonetheless, the court stated that even if the balancing test used in *Skinner* was applied, the court would still find that a showing of individualized suspicion was required because unlike the railway workers in *Skinner*, Henry did not have a reduced expectation of privacy. Additionally, unlike the drug-testing program in *Skinner*, the grand jury would not be jeopardized by requiring that it establish individualized suspicion before demanding the blood sample. *Id.* at 254, 255 n.6.

352. *Id.* at 255.

District of Kentucky rejected *Henry*'s conclusion that reasonable suspicion would suffice to find a grand jury subpoena demanding the extraction of blood to be reasonable.³⁵³ In *In re Grand Jury (T.S.)*, the Court relied on *Schmerber* and declared that such a subpoena does constitute a search which may only be conducted after a judicial finding of probable cause.³⁵⁴

The facts in *In re Grand Jury (T.S.)* raise Fourth Amendment issues similar to those in *Henry*. On October 26, 1989, T.S.'s daughter disappeared.³⁵⁵ Three years later, the Government sought to compare T.S.'s blood with other samples it had found so it served T.S. with a grand jury subpoena demanding a blood specimen.³⁵⁶ T.S. moved to quash the subpoena contending that, *inter alia*,³⁵⁷ it violated his Fourth Amendment rights.³⁵⁸ The court agreed and granted the motion.³⁵⁹

In its decision, the court reiterated the principles of *Schmerber* and declared that because intrusions into the body are so invasive of a person's privacy, they should be permitted "only in stringently limited circumstances."³⁶⁰ If the Government conducts such a search without a warrant, then, at a minimum, there should be probable cause and exigent circumstances to support it.³⁶¹ The court found that, unlike in *Schmerber*, there were no exigent circumstances here.³⁶² Neither the passage of time, nor T.S. himself, could change or destroy the composition of his blood.³⁶³ In further contrast to *Schmerber*, the demand for the blood was not incident to a valid arrest supported by probable cause but came through a subpoena which did not even indicate whether T.S. was a target of the investiga-

353. *In re Grand Jury (T.S.)*, 816 F. Supp. 1196 (W.D. Ky. 1993).

354. *In re Grand Jury (T.S.)*, 816 F. Supp. at 1200.

Under the reasoning of *Schmerber* and *Winston*, we believe that the compulsory extraction of blood samples is permissible under the Fourth Amendment only in stringently limited circumstances. . . . Without a warrant or valid arrest, a search and seizure consisting of compulsory blood extraction and testing will be constitutionally permissible under the Fourth Amendment *only* (1) where there is probable cause to believe that incriminating evidence will be found and (2) exigent circumstances require immediate action.

Id. (emphasis in original) (citations omitted).

355. *Id.* at 1197.

356. *Id.*

357. T.S. also argued that the subpoena violated his Fifth Amendment privilege against self-incrimination. *Id.* at 1197. The court quickly rejected this argument by relying on the holding in *Schmerber*, where the Supreme Court ruled that a blood test is not testimonial and, therefore, does not implicate the Fifth Amendment. *Id.*

358. *Id.*

359. *Id.* at 1206.

360. *Id.* at 1200.

361. *Id.*

362. *Id.*

363. *Id.*

tion.³⁶⁴

The court dismissed the contention that probable cause was not required because the demand in this case was made by a grand jury subpoena.³⁶⁵ Although it recognized that the Supreme Court, in *United States v. R. Enterprises, Inc.*,³⁶⁶ had declared that the grand jury need not have probable cause to issue a subpoena, the district court found that principle inapplicable here.³⁶⁷ The court found that in *R. Enterprises*, the grand jury was demanding documents pursuant to FRCP 17(c),³⁶⁸ while in this case, the grand jury was demanding blood which "is not clearly within the scope of Rule 17(c)."³⁶⁹ Additionally, it reasoned that a demand for a sample of one's blood raises different privacy concerns from those associated with a subpoena seeking documents.³⁷⁰ Lastly, it recognized that the challenge to the subpoena in *R. Enterprises* was based on FRCP 17(c), and, therefore, it only concerned the reasonableness standards under that rule; it did not address constitutional limits.³⁷¹ The court stressed that due to the significant "difference inherent in a search requiring bodily intrusion and the special sensitivity with which such searches must be viewed, we believe that *R. Enterprises* neither constrains us in our Fourth Amendment inquiry nor directs our analysis."³⁷²

The court declined to use the reasonable suspicion standard to evaluate such a subpoena.³⁷³ It questioned the *Henry* court's conclusion that a probable cause requirement in this context was unworkable.³⁷⁴ The court distinguished probable cause for the return of an indictment from that required for the issuance of a search warrant³⁷⁵ and stated, "[A]n indictment requires that the grand jury ascertain whether there is probable cause that a crime has been committed and a particular person committed the crime."³⁷⁶ This standard requires particularity, focusing on a certain crime and a certain perpetrator.³⁷⁷

364. *Id.*

365. *Id.* at 1205.

366. 498 U.S. 292 (1991). For an analysis of *United States v. R. Enterprises, Inc.*, see Daniel E. Chefitz, Note, *Fourth Amendment—The Presumption of Reasonableness of a Subpoena Duces Tecum Issued By A Grand Jury*, 82 J. CRIM. L. & CRIMINOLOGY 829 (1992).

367. *In re Grand Jury* (T.S.), 816 F. Supp. at 1200-02.

368. *In re Grand Jury* (T.S.), 816 F. Supp. at 1202.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 1203.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

In contrast, a search warrant requires that there be “a fair probability that evidence of a crime will be found in the place searched.”³⁷⁸ This is a flexible standard determined under the totality of the circumstances.³⁷⁹ It focuses on possible evidence of a crime rather than the particular charge that may be filed or the particular person that may be accused.³⁸⁰ Consequently, by ordering the grand jury to establish probable cause before enforcing a subpoena compelling a bodily intrusion, the court would not be demanding that the grand jury reach the ultimate conclusion that it is generally required to make: that there is probable cause for an indictment.³⁸¹

The court also dismissed the notion that a probable cause requirement would interfere with the efficient functioning of the grand jury.³⁸² The court recognized that the Government often resorts to search warrants either before a grand jury investigation has begun or while it is progressing.³⁸³ Consequently, there would be no significant impediment to the grand jury if the court required a showing of probable cause before a blood sample was demanded.³⁸⁴ In addition, the court rejected the *Henry* court’s adoption of an individualized suspicion standard because it believed that it emanated from a misplaced reliance³⁸⁵ on *Skinner*. Unlike the Federal Railway Administration’s explicit directives, here there were “no narrowly defined regulations or other guidelines to govern the compulsory extraction of T.S.’s blood samples or to limit the discretion of those seeking to obtain the samples.”³⁸⁶ Additionally, unlike the railway workers, the subpoena recipient had no diminished expectation of privacy.³⁸⁷ Finally, in contrast to the blood-alcohol evidence in *Skinner*, DNA does not change or disappear with the passage of time,³⁸⁸ so there is no concern about the evanescence of the relevant evidence.³⁸⁹ Therefore, the Court concluded that *Skinner* was inapplicable and that the grand jury subpoena for blood violated T.S.’s Fourth Amendment rights.³⁹⁰

The court further held that, because a subpoena is not supported by

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 1204.

383. *Id.*

384. *Id.*

385. *Id.* at 1203-04.

386. *Id.* at 1204.

387. *Id.*

388. *Id.* at 1205.

389. *Id.*

390. *Id.*

probable cause, using one to obtain a sample of an individual's blood would be unconstitutional.³⁹¹ The Government would have to procure a probable cause warrant to conduct this procedure.³⁹² Relying on *Winston v. Lee*,³⁹³ the court ruled that in addition to establishing probable cause, the Government would also have to show that its need for this evidence outweighed any risk of harm to T.S.³⁹⁴

Although this court correctly concluded that the Government must establish probable cause before it seeks to compel the extraction of blood from a person,³⁹⁵ its dismissal of *R. Enterprises* and *Henry* is questionable on at least three grounds.

First, FRCRP 17(c) authorizes the production of "books, papers, documents or other *objects*."³⁹⁶ Presumably a blood sample could be viewed as an "object."³⁹⁷ Consequently, the demand for a production of such a sample is probably within the scope of Rule 17(c). Second, the court failed to explain why the demand for blood raises privacy concerns different from those associated with a subpoena for any documents. Certainly a grand jury subpoena for one's personal diary or intimate letters also raises significant privacy interests.³⁹⁸ Furthermore, *Henry* did not

391. *Id.*

392. *Id.* at 1205-06.

393. 470 U.S. 753 (1985).

394. *In re Grand Jury* (T.S.), 816 F. Supp. at 1206.

395. See also *Commonwealth v. Downey*, 553 N.E.2d 1303, 1306-07 (Mass. 1990) (holding that because the grand jury already had probable cause to indict the defendant and because he had a hearing at which he challenged the constitutionality of the blood sample request, the order compelling him to provide a sample did not violate his Fourth Amendment rights); *Grand Jury v. Marquez*, 604 N.E.2d 929, 936-37 (Ill. 1992) (holding that a grand jury subpoena for body hair must be supported by probable cause before it will be enforced because allowing such bodily intrusions on the basis of reasonable suspicion would violate the Illinois Constitution). For a discussion of *Grand Jury v. Marquez*, see Hon. Michael J. Burke & Kathryn E. Creswell, *Constitutional Privacy Limitations on Grand Jury Subpoenas*, 81 ILL. B.J. 462, 463-67 (1993).

396. FED. R. CRIM. P. 17(c) (emphasis added).

397. David S. Rudolf & Thomas K. Maher, *Behind Closed Doors*, THE CHAMPION, June 1993, at 32; see also *United States v. Euge*, 444 U.S. 707, 713 n.7 (1980).

Wigmore has identified the testimonial duty as including an obligation 'to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also the corporal facts existing on his body.'

Id. (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2194 (1961)). In *Euge*, the Court held that the power of the Internal Revenue Service to summons individuals to "appear" and to "produce such books, papers, records or other data," included the power to compel handwriting exemplars from those summoned. *Id.* at 719.

398. Traditionally, the Fifth Amendment protected people from the compelled production of private documents. *Boyd v. United States* 116 U.S. 616, 634-35 (1886). In recent years,

rely on the holding in *Skinner* to reach its conclusion that individualized suspicion would suffice to find such a subpoena reasonable. The court in *Henry* specifically rejected the "special needs" doctrine used in *Skinner*³⁹⁹ and merely cited *Skinner* for the principle that in certain cases where "a showing of probable cause has not proved possible, the Court has turned to a showing of individualized suspicion."⁴⁰⁰ Because the court in *Henry* had concluded that a finding of probable cause in the context of a grand jury subpoena was "untenable,"⁴⁰¹ it balanced the interests involved and concluded that the lesser standard of reasonable suspicion should be used to evaluate the reasonableness of such a subpoena.⁴⁰² Consequently, the court's rejection of *Henry*'s ruling is based on flawed reasoning.

In a state case on this same issue, the Court of Criminal Appeals of Oklahoma has also ruled that a showing of probable cause is required before a grand jury may subpoena a person's blood.⁴⁰³ As in the two previous cases, the Oklahoma court quickly determined that the extraction of blood involves a search under the Fourth Amendment.⁴⁰⁴ Although not citing *In re Grand Jury (T.S.)*, this court also rejected *Henry*'s holding that reasonable suspicion, rather than probable cause, is required to constitutionally validate these subpoenas.⁴⁰⁵ It found no reason to reduce one's constitutional protections just because a grand jury, rather than a police officer, seeks to invade a person's skin.⁴⁰⁶ The court recognized that if it reduced such traditional constitutional protections, the Government could

however, the Supreme Court has held that if a document is created voluntarily, the recipient may *not* claim the protection of the Fifth Amendment for the contents of the document because the element of government compulsion is absent. *E.g.*, *United States v. Doe*, 465 U.S. 605, 611-12 (1984); *Fisher v. United States*, 425 U.S. 391, 397, 409-10 (1976); *see also In re Grand Jury*, 1 F.3d 87, 92-93 (2d Cir. 1993); *United States v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991), *aff'd after remand sub nom. United States v. Stone*, 976 F.2d 909, 911 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1843 (1993); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *In re Grand Jury*, 759 F.2d 1418, 1419-20 (9th Cir. 1985). Consequently, subpoena recipients have turned to the Fourth Amendment for possible protection of their privacy in personal documents. *E.g.*, *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 18, 21 (D.D.C. 1994); *In re Grand Jury (Arrington)*, 782 F. Supp. 1518, 1525 (N.D. Ala. 1992), *dismissed as moot in part, affirmed in part*, 955 F.2d 670 (11th Cir. 1992); *see also Marano v. Holland*, 366 S.E.2d 117, 127 (W. Va. 1988) (holding that a production order for a defendant's personal documents violated the Fourth Amendment because the order was not supported by probable cause).

399. *Henry v. Ryan*, 775 F. Supp. 247, 254 n.6 (N.D. Ill. 1991).

400. *Id.*

401. *Id.* at 254.

402. *Id.*

403. *Woolverton v. Grand Jury*, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993).

404. *Id.* at 1115.

405. *Id.*

406. *Id.*

abuse the grand jury system.⁴⁰⁷ For example, every time it was not possible to establish probable cause to secure a search warrant for blood, a prosecutor could simply circumvent the Fourth Amendment and seek the evidence by way of a grand jury subpoena.⁴⁰⁸ This concern would not be limited to a demand for blood samples, but would apply to any grand jury demand for intrusive physical evidence.⁴⁰⁹ Although the court realized that the purpose of the grand jury is to determine whether there is probable cause to indict an individual, it did not believe it would either burden the grand jury or compromise its secrecy to require a showing of probable cause before it invaded a person's body.⁴¹⁰

Notwithstanding that the courts disagree about what standard should be used to evaluate the reasonableness of a subpoena for blood, they do agree on one salient point—a subpoena that lacks a preliminary showing of at least some individualized suspicion violates the Fourth Amendment.

E. The Court Should Require a Preliminary Showing of Probable Cause to Support Subpoenas for Blood

Henry, In re Grand Jury (T.S.), and *Woolverton* demonstrate the conflict over what standard should be used to evaluate the constitutionality of a subpoena for a blood sample. In view of Supreme Court precedent and the nature of this particular type of invasion of privacy, the Supreme Court should adopt the conclusions of the courts in *In re Grand Jury (T.S.)* and *Woolverton* and require the Government to establish probable cause before permitting it to demand a sample of a person's blood.⁴¹¹

The Fourth Amendment demands that the Government establish probable cause before it invades one's body. The Court made it clear in *Schmerber* that the Government must have probable cause to invade an arrestee's body to obtain a sample of blood for investigation of a criminal offense.⁴¹² It dispensed with the warrant requirement only because of the

407. *Id.*

408. *Id.*

409. *Id.* See also, *Grand Jury v. Marquez*, 604 N.E.2d 929, 939 (Ill. 1992) (ruling that a grand jury subpoena for head and pubic hair must also be supported by probable cause).

410. *Woolverton*, 859 P.2d at 1115-16. The court offered no reasons for this conclusion but merely stated:

While we recognize that a grand jury's purpose is to establish probable cause, we do not believe it will be too burdensome to require probable cause for a grand jury subpoena in these cases. In addition, a probable cause determination can be judicially made without unduly burdening a grand jury's investigation or violating grand jury secrecy.

Id.

411. See also *Renskers*, *supra* note 247, at 323-24.

412. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

exigencies in that case.⁴¹³ Those exigencies do not exist with a subpoena for DNA testing of blood.

Unlike the blood extraction in *Schmerber*, the grand jury demand for invasion of the body is not made incident to a valid arrest. To the contrary, the Government seeks to conduct this bodily intrusion in order to gather evidence to culminate in a valid arrest. The function of the grand jury is to investigate a crime, focus on a suspect, and charge the accused.⁴¹⁴ In most instances, the arrest follows the demand for evidence, the establishment of probable cause for the charge, and the indictment of the individual.⁴¹⁵

Additionally, when the Government seeks to invade the body in order to extract blood for DNA analysis, there are no exigent circumstances. Unlike alcohol in the bloodstream, which dissipates over time, DNA does not change.⁴¹⁶ Therefore, there is no danger that recipients of a subpoena for blood can change or destroy their DNA composition.⁴¹⁷

Irrespective of the fact that a blood test is commonplace and does not involve a serious risk⁴¹⁸ if conducted in a safe environment by a competent individual, *Schmerber* stressed that in the context of a criminal investigation, the test must be preceded by a warrant based on probable cause. If exigent circumstances are present, then the warrant requirement may be abandoned, but probable cause still must exist.⁴¹⁹

When searching for blood, it should be irrelevant whether a criminal investigation is initiated by the grand jury or by law enforcement agencies. The goals of these institutions are the same: investigating criminal matters and amassing evidence through the invasion of the body.⁴²⁰ While it is true that since the decision in *Hale v. Henkel*, the Court has treated a grand jury subpoena differently than it has a police search, the following reasons demonstrate that this distinction is inappropriate with respect to a subpoena for blood. First, unlike a search warrant where the police inspect a person's personal belongings for seizure of specific items, a subpoena for physical evidence permits recipients to sift through their own belongings to satisfy the demand.⁴²¹ Thus, there is a diminished infringement on privacy.

413. *Id.* at 771 (finding that the delay necessary to obtain a warrant threatened the loss of evidence).

414. *See supra* notes 22-25 and accompanying text.

415. *See generally* 1 BEALE & BRYSON, *supra* note 17, § 6:40, at 232-42 (discussing the reasons to have sealed indictments and the possible effect on due process).

416. *See supra* note 258 and accompanying text; *see also*, Burk, *supra* note 258, at 470.

417. *See supra* note 258 and accompanying text.

418. *See supra* notes 229-34 and accompanying text.

419. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

420. *See supra* notes 354 & 406 and accompanying text.

421. *See supra* notes 128 & 139 and accompanying text.

This, however, is not the case with a subpoena for a sample of blood. Such a subpoena authorizes the Government to enter a person's body to extract the possible evidence, rather than allowing the recipient to merely provide a self-obtained DNA analysis. This procedure implicates "the personal and deep-rooted expectations of privacy"⁴²² that the Constitution firmly protects by requiring a preliminary showing of probable cause.

The information that is disclosed through blood analysis is highly confidential.⁴²³ In addition to revealing DNA composition, blood testing may disclose genetic disorders, predisposition to medical conditions, or the presence of certain antibodies in the blood.⁴²⁴ Such information is highly personal, possibly traumatizing,⁴²⁵ and potentially stigmatizing.⁴²⁶

The Court has recognized that unlike the target of a search warrant, a recipient of a subpoena has notice of the search⁴²⁷ and, therefore, may move to quash it before it is enforced.⁴²⁸ This right is a hollow one, however, if the Government need not establish probable cause before the court enforces a subpoena. It still allows the Government to invade a person's privacy without a preliminary showing of facts justifying this action.

A motion to quash is of minimal value to a subpoena recipient because there are only limited challenges to a subpoena duces tecum. Currently, in order to be reasonable under the Fourth Amendment, a subpoena must not be overbroad.⁴²⁹ A recipient of a subpoena for one blood sample could

422. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

423. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); Cavoli, *supra* note 213, at 1401.

424. *See supra* text accompanying note 266; Emily Yoffe, *Is Kary Mullis God? (Or Just the Big Kuhuna?)*, *ESQUIRE MAG.*, July 1994, at 70.

425. *But see* Cavoli, *supra* note 213, at 1401-02 (suggesting that such concerns are misplaced because the forensic use of DNA differs significantly from its medical application).

426. Hoeffel, *supra* note 198, at 531-33; *see also supra* text accompanying note 266.

427. *See supra* note 139 and accompanying text.

428. *See supra* note 139 and accompanying text.

429. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906) (stating that the Fourth Amendment limits a subpoena for "contracts and documents" to relevant documents); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (holding that the Fourth Amendment guards against abuse only by way of too much indefiniteness or breadth in that the items requested must be "particularly described"); *United States v. Susskind*, 965 F.2d 80, 86 (6th Cir. 1992), *rehearing en banc*, 4 F.3d 1400 (6th Cir. 1993) (finding that the defendant has the burden of showing the subpoena was "unreasonably sweeping" in its coverage); *United States v. Anderson*, 906 F.2d 1485, 1496 (10th Cir. 1990) (affirming the standard that a grand jury subpoena is not unreasonable if it orders production of material relevant to the investigation, specifies the items with reasonable particularity, and spans a reasonable time period); *In re Horowitz*, 482 F.2d 72, 79 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973) (holding the a subpoena for the contents of three file cabinets sufficiently particular to survive a Fourth Amendment challenge); *People v. DeLaire*, 610 N.E.2d 1277, 1283 (Ill. App. Ct. 1993)

not challenge it on the grounds of overbreadth because a single demand for one sample of blood can not possibly be viewed as overbroad.

A recipient of a grand jury subpoena may challenge the demand under FRCP 17(c). Pursuant to that rule, a motion to quash a subpoena may be granted if it is found to be "unreasonable or oppressive."⁴³⁰ If a challenger argues that the subpoena is unreasonable on the grounds of relevancy, the Court has ruled that he must show that the materials sought by the Government will not produce information relevant to the investigation.⁴³¹

When a recipient attacks a grand jury subpoena for blood on Fourth Amendment grounds, he is not addressing the question of whether the requested evidence is relevant⁴³² to the investigation. Instead, he is contending that, even if the evidence may be relevant, the Government has not shown sufficient facts to permit this intrusion on his reasonable expectation of privacy,⁴³³ that is, the Government has failed to establish a fair probability, not a mere possibility, that the material sought is evidence of a crime and that it will be found on him.⁴³⁴ If the Court allowed subpoenas for invasions of privacy merely on the basis of relevancy and not probable cause, then any time substances containing DNA were found at a crime scene and a victim alleged that the perpetrator was a member of a certain race, the Government could subpoena individuals of that race who lived in the area and demand that they all present themselves for the extraction and testing of their blood.⁴³⁵ The evidence of their DNA composition might be relevant to the investigation, but such Government action certainly would not be permissible under the Fourth Amendment.⁴³⁶ Thus, a FRCP 17(c) challenge based on relevancy is

(determining that acquisition of message unit detail records is constitutional if relevant and not excessive).

430. FED. R. CRIM. P. 17(c).

431. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

432. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any *tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401 (emphasis added).

433. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) ("The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [into the body to extract blood] on the mere chance that desired evidence might be obtained.").

434. In order to establish probable cause, the Government must set forth facts that would lead a neutral magistrate to believe that a *particular person* has evidence that is relevant to the specific crime under investigation. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983); *see also* *Davis v. Texas*, 831 S.W.2d 426, 440 (Tex. Ct. App. 1992).

435. *Grand Jury v. Marquez*, 604 N.E.2d 929, 935 (Ill. 1992).

436. *Id.* *See also* *Davis v. Mississippi*, 394 U.S. 721, 728 (1969) (finding that the seizure of 24 black men, including Davis, for fingerprinting, based on one lead that the offender was black, was unconstitutional because the seizure was not supported by probable cause); *Renskers*, *supra* note 247, at 328-30 (arguing that the Fourth Amendment protects against mass

inapposite. A motion to quash such a subpoena is of little value, unless it is recognized that the Fourth Amendment requires that a subpoena must be supported by probable cause before it can be enforced.

If a showing of probable cause is not required, the Government will be allowed to circumvent the Fourth Amendment. If the Government may effect this invasion of the recipient's body without establishing probable cause, the Government may realize through a subpoena what it cannot constitutionally accomplish in any other criminal investigation—the invasion of the body for physical evidence of a crime without any preliminary showing of probable cause.⁴³⁷ Without such a showing, the grand jury may choose to target a person and seek a blood sample on the “mere chance” that the search will yield evidence of a crime.⁴³⁸ The Supreme Court has firmly rejected this practice.⁴³⁹

Additionally, a subpoena for a blood sample is *sui generis*. Such a subpoena cannot be compared with a subpoena for other objects. In the case of objects, a person may not entertain a reasonable expectation of privacy in an object routinely exposed to others.⁴⁴⁰ Consequently, when the government demands such objects, no “search” has taken place.⁴⁴¹ This is not the case with blood. People do not regularly expose their blood or its composition to others. Consequently, a subpoena that demands such an invasion of privacy is a search which requires a preliminary showing of probable cause.

Furthermore, this type of subpoena, unlike a subpoena for objects, is entitled to significant Fourth Amendment protection because it implicates heightened privacy concerns.⁴⁴² Reasonable suspicion is insufficient because this standard is reserved for those instances where the Government intrusion is slight.⁴⁴³ When the Government seeks to stick a needle in a person's arm to extract a substance from which it can ascertain highly personal and confidential information,⁴⁴⁴ the intrusion is not slight.⁴⁴⁵ Such government conduct must be supported by probable cause in order to be constitutionally permissible.⁴⁴⁶

“round ups” by requiring some degree of individualized suspicion).

437. See *supra* notes 407-08 and accompanying text.

438. *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1205 (W.D. Ky. 1993).

439. *Schmerber v. California*, 384 U.S. 747, 769-70 (1966).

440. *Katz v. United States*, 389 U.S. 347, 351 (1967).

441. *Id.*

442. *Schmerber*, 384 U.S. at 767.

443. See *supra* note 244 and accompanying text.

444. See *supra* text accompanying notes 241-44.

445. *Schmerber*, 384 U.S. at 769; *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1205 (W.D. Ky. 1993).

446. *Schmerber*, 384 U.S. at 770; *In re Grand Jury* (T.S.), 816 F. Supp. at 1205-06. *But see*, Cavoli, *supra* note 213, at 1405 (arguing that “reasonable suspicion,” rather than probable

The Court has stressed that in most cases, it will not require the grand jury to show probable cause to issue a subpoena for physical evidence because the grand jury is merely an investigatory body.⁴⁴⁷ Its mission is to determine whether probable cause exists to believe that a crime has been committed and that a certain person has committed it.⁴⁴⁸ To reach these conclusions, it is to examine every conceivable piece of evidence.⁴⁴⁹ Because of this investigatory role, it may be argued, as the court did in *Henry*, that requiring the grand jury to initially establish probable cause to subpoena a person's blood is both illogical and impractical.⁴⁵⁰ It may be viewed as illogical because the ultimate task of the grand jury is to determine whether there is probable cause to believe a crime has been committed and whether a particular person should be charged.⁴⁵¹ Consequently, requiring the prosecutor or grand jury foreperson to establish probable cause before the enforcement of such a subpoena would be illogical—it would compel a showing of probable cause before the grand jury had fully investigated the case and established probable cause.⁴⁵²

However, as the court found in *In re Grand Jury (T.S.)*, the probable cause needed to obtain a search warrant differs from that which is required for indicting a person.⁴⁵³ In order to secure a search warrant, the Government must establish by a totality of the circumstances that there is a fair probability that the evidence sought will be found in the place or on the person to be searched.⁴⁵⁴ In contrast, the probable cause needed to charge a suspect requires that there be a fair probability that a crime has been committed and that a certain person has committed it.⁴⁵⁵

These two standards differ substantially. The first concentrates on facts leading to the conclusion that evidence or instrumentalities of a crime will be found in a certain location or on a certain person. The other concentrates on facts leading to the conclusion that a crime has been committed and a certain suspect has committed it. Just because evidence of a crime may be found on a certain person does not mean that person should be charged with a crime.⁴⁵⁶ The person may have a justification

cause, is sufficient to support a court order for a blood sample).

447. *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991).

448. *Id.*

449. *Id.*

450. *Henry v. Ryan*, 775 F. Supp. 247, 259 (N.D. Ill. 1991).

451. *Id.*

452. *Blair v. United States*, 250 U.S. 273, 282 (1919); *see also R. Enters., Inc.*, 498 U.S. at 297.

453. *In re Grand Jury (T.S.)*, 816 F. Supp. 1196, 1203 (W.D. Ky. 1993).

454. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

455. *Id.* at 1201 (citing *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991)).

456. *See, e.g.*, Jim Newton, *SIMPSON CASE HEIGHTENS STAKES IN "DNA WAR,"* L.A. TIMES, Aug. 7, 1994, at A29.

or defense for any or all alleged actions or may be merely a witness to the crime who has not yet come forward. A search of the person may or may not lead the grand jury to its target. Therefore, requiring the Government to establish probable cause before invading a person's body for evidence would not necessarily duplicate the grand jury's task of determining whether there was probable cause to indict.⁴⁵⁷ Despite the court's declaration in *Henry*, it is not therefore "untenable" to require a preliminary showing of probable cause before permitting the grand jury to invade a person's body for corporeal evidence.⁴⁵⁸ The court's conclusion that the lesser standard of reasonable suspicion rather than probable cause should be adopted in this situation is based on a faulty premise and should not be followed.

Additionally, requiring probable cause before permitting the Government to invade the body for evidence may be considered impractical.⁴⁵⁹ Placing the prerequisite of probable cause on a subpoena demanding blood from a person would impose a burden on the broad investigatory powers of the grand jury.⁴⁶⁰ It would certainly restrict the grand jury's power to merely demand any evidence it might consider relevant or helpful. It may delay the course of the investigation, which the Court has always been reluctant to do.⁴⁶¹

But the Government regularly interrupts grand jury proceedings: to secure a warrant to search for and seize certain items,⁴⁶² to respond to motions to quash by a subpoena recipient,⁴⁶³ and to request that a court order a recalcitrant witness to testify.⁴⁶⁴ These interruptions are acceptable, however, because they are required by law. Here, the disruption caused by requiring the Government to make a preliminary showing of probable cause before conducting this search is also acceptable, because it is required by the Fourth Amendment.⁴⁶⁵

The Court has already held that the Fourth Amendment requires that

457. *In re Grand Jury* (T.S.), 816 F. Supp. at 1203.

458. *Id.* at 1203.

459. *Burke & Creswell*, *supra* note 395, at 467.

460. *United States v. R. Enters., Inc.*, 498 U.S. 292, 298 (1991) ("The teaching of the Court's decisions is clear: A grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.'") (citing *United States v. Calandra*, 414 U.S. 338, 343 (1974)).

461. *See supra* notes 37-39 and accompanying text.

462. *In re Grand Jury* (T.S.), 816 F. Supp. at 1204.

463. *FED. R. CRIM. P.* 17(c); *see also, id.*; *Henry v. Ryan*, 775 F. Supp. 247, 249 (N.D. Ill. 1991).

464. 28 U.S.C. § 1826 (1988); *FED. R. CRIM. P.* 17(g).

465. *In re Grand Jury* (T.S.), 816 F. Supp. at 1205; *Woolverton v. Grand Jury*, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993).

probable cause must exist before the police extract a sample of blood from an arrestee.⁴⁶⁶ Under the Court's own standards, there is no meaningful difference when it is the prosecutor,⁴⁶⁷ rather than the police, who is demanding a specimen of blood. For constitutional purposes, one Government agent is the same as another Government agent.⁴⁶⁸ Furthermore, if the Government must establish probable cause to extract a blood sample from an arrestee,⁴⁶⁹ a fortiori, it should be required to do so when it seeks to extract blood from a mere suspect.

A preliminary showing of probable cause, however, would have an effect on the three critical features of the grand jury—its independence, its secrecy, and its expansive power—because it would require the Government to justify its demand in writing and would authorize the Court to evaluate this justification before serving the subpoena.⁴⁷⁰ But the Court has never held that any of the grand jury's traditional features are without limits.⁴⁷¹ The grand jury's independence is already restricted by the fact that it is the prosecutor who directs the investigations by deciding which matters to

466. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

467. *See supra* text accompanying notes 40-50.

468. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989).

Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. . . . A railroad that complies with the provisions of . . . the regulations does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment.

Id. (citations omitted); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986).

Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

Id. (footnotes omitted); *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial [for *Miranda* purposes]. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State.

Id.; *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, [due process] to the Government. . . .") (citations omitted).

469. *Schmerber*, 384 U.S. at 770.

470. *See infra* note 493 and accompanying text.

471. *See supra* text 92-98 and accompanying text.

explore and what evidence to present.⁴⁷² Additionally, the secrecy provisions of the grand jury are not absolute.⁴⁷³ In the face of "compelling necessity,"⁴⁷⁴ the Court may disclose confidential matters occurring before the grand jury.⁴⁷⁵ Furthermore, constitutional provisions⁴⁷⁶ limit the power of the grand jury. It is the Fourth Amendment that requires the Government to establish probable cause before it seeks to extract a blood sample from a subpoena recipient.⁴⁷⁷ Although such a requirement affects the independence, secrecy, and power of the grand jury, it is a requirement mandated by the Fourth Amendment to the Constitution.

F. Applying a Showing of Probable Cause to a Grand Jury Subpoena for Blood

If a probable cause standard was applied to a current grand jury subpoena for blood, the subpoena would fail to meet that standard. This subpoena, unlike a warrant, is not issued by a judge.⁴⁷⁸ It is issued by a clerk of the court.⁴⁷⁹ No one is required to establish probable cause or even individualized suspicion to obtain such a subpoena.⁴⁸⁰ The prosecutor merely requests a blank subpoena from the clerk and then fills in the request for physical evidence.⁴⁸¹ No additional supporting information is required before it is either served or is enforced.⁴⁸² In light of the preceding analysis, such a subpoena violates the Fourth Amendment.

V. Proposal for Change

The law and its many facets is not an empty bottle. Rather, it is one, which like good wine, is nurtured in the vintage of experience. Recent experience has required more aggressive prosecution of society's fight against the mounting evils of crime. We commend both vigorous prosecution and all legitimate means in aid of this laudable task. This,

472. See *supra* text accompanying notes 40-50.

473. See *supra* notes 59-63 and accompanying text.

474. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

475. See *supra* notes 61-64 and accompanying text.

476. See *supra* notes 95-98 and accompanying text.

477. *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1202-1203 (W.D. Ky. 1993); *Woolverton v. Grand Jury*, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993).

478. FED. R. CRIM. P. 17(a).

479. *Id.*

480. *Id.*; *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991).

481. FED. R. CRIM. P. 17(a).

482. *Id.*; *R. Enters., Inc.*, 498 U.S. at 297-98.

however, does not mean that society can afford a "no holds barred" approach to law enforcement lest the "solution" engender faults of an equally serious nature.⁴⁸³

A grand jury subpoena for blood constitutes a search.⁴⁸⁴ This search must be preceded by a finding of probable cause.⁴⁸⁵ The Court, therefore, has two options. The first option would require that grand juries secure a search warrant each time they sought such evidence.⁴⁸⁶ The second option, would require the Government to establish probable cause before the service of such a subpoena.⁴⁸⁷

The first option has the benefit of being familiar to those in the criminal justice field. Just as with any other search warrant, the Government would have to approach a neutral magistrate and present a sworn affidavit setting forth probable cause for the search.⁴⁸⁸ Because the warrant is demanding an invasion into the body, before issuing the warrant, the magistrate must find probable cause for the search⁴⁸⁹ and must also conclude that the need for this evidence outweighs any risk of harm to the individual.⁴⁹⁰ If the court decides to issue such a warrant, the Government will be authorized to conduct the search during daytime hours, within a designated period⁴⁹¹ of time.

The second option has the strength of lower court support. It would require the Government to make a preliminary showing⁴⁹² of probable

483. *United States v. Klubock*, 832 F.2d 649, 658, *vacated, opinion withdrawn*, 832 F.2d 664 (1st Cir. 1987) (en banc).

484. *See supra* notes 350, 354 & 404 and accompanying text.

485. *See supra* notes 354 & 403 and accompanying text.

486. *In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1205-06 (W.D. Ky. 1993).

487. *See infra* notes 507-12 and accompanying text.

488. FED. R. CRIM. P. 41(c)(1).

489. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

490. *Winston v. Lee*, 470 U.S. 753, 761 (1985).

491. FED. R. CRIM. P. 41(c)(1).

492. *See, e.g., Grand Jury v. Marquez*, 604 N.E.2d 929, 939 (Ill. 1992) (holding that the prosecutor must establish probable cause before a subpoena for body hair samples will be enforced). The court also held that a prosecutor must show relevance and individualized suspicion before a subpoena for fingerprints, palm prints and an appearance in a lineup will be enforced. *Id.*; *see also In re Rende*, 633 N.E.2d 746, 749-50 (Ill. App. Ct. 1993) (ruling that the State's Attorney must make either a sworn statement or present an affidavit to the court establishing "individualized suspicion and relevance" before the court will enforce a grand jury subpoena demanding that an individual appear in a lineup); *see also Commonwealth v. Doe*, 563 N.E.2d 1349, 1352-53 (Mass. 1990) (holding that an order requiring a suspect to participate in a pretrial lineup must be supported by "reasonable suspicion"); *In re Armed Robbery*, 659 P.2d 1092, 1095-96 (Wash. 1983) (holding that requiring a target to appear in a pretrial lineup was a Fourth Amendment seizure that must be supported by probable cause); *In re Kelley*, 433 A.2d 704, 707 (D.C. 1981) (requiring a prosecutor who wanted a target to participate in a lineup to first show a basis for the lineup that was consistent

cause before the service of such a subpoena.⁴⁹³ There is precedent for requiring the Government to make some type of preliminary showing for a subpoena. In *In re Grand Jury (Schofield)*,⁴⁹⁴ the Third Circuit held that before it would enforce a subpoena duces tecum, the Government had to show by way of affidavit that the information sought is relevant to and needed for an investigation being conducted by the grand jury.⁴⁹⁵

Relying on *Schofield*, the Fourth Circuit held in *In re Special Grand Jury (Harvey)*⁴⁹⁶ that when an attorney subpoenaed by a grand jury has an ongoing attorney-client relationship with a grand jury target, the Government must make a preliminary showing of relevance and need before the court can enforce the subpoena demanding an attorney testify about a client.⁴⁹⁷ The First Circuit has affirmed⁴⁹⁸ the adoption of a local

with the grand jury's legitimate function).

493. See, e.g., *Woolverton v. Grand Jury*, 859 P.2d 1112, 1116 (Okla. Crim. App. 1993) (ruling that a grand jury subpoena demanding a person's blood must be preceded by a showing of probable cause). The court declared that "[i]n order for this determination to be made, the foreman of the grand jury should present an affidavit to the presiding judge. The affidavit should contain facts necessary for a probable cause determination. To preserve the secrecy of the grand jury proceedings, the affidavit shall be kept under seal." *Id.*

494. *In re Grand Jury (Schofield)*, 486 F.2d 85, 93 (3d Cir. 1973), later appeal, 507 F.2d 963 (3d Cir. 1975), cert. denied, 421 U.S. 1015 (1975).

495. *Id.* Other circuits, however, have refused to follow the Third Circuit. See, e.g., *In re Grand Jury Subpoena (Doe)*, 781 F.2d 238 (2d Cir. 1986) (en banc), cert. denied, 475 U.S. 1108 (1986) (finding that the Government is not required to make a preliminary showing of need); *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir. 1984) (holding that the Government is not required to make a preliminary showing of relevancy); *United States v. Santucci*, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459 U.S. 1109 (1983) (allowing the Government to fill out grand jury subpoenas demanding identification material without actual prior grand jury authorization); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980) ("The practical responsibility for controlling grand jury excesses lies with the district court . . ."); *United States v. Wilson*, 614 F.2d 1224 (9th Cir. 1980) (stating that supervisory control of grand jury procedures is narrowly construed in the Ninth Circuit). Additionally, this decision is called into question by *United States v. R. Enterprises, Inc.*, which held that a grand jury subpoena is presumed to be valid, and that no preliminary showing of relevance, admissibility or specificity need be made by the Government before such a subpoena is enforced. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991). If the movant can show that there is no reasonable possibility that the subpoena will produce information relevant to the grand jury investigation, the court may modify or quash the subpoena.

496. 676 F.2d 1005, 1012 (4th Cir. 1982), vacated and withdrawn, 697 F.2d 112 (4th Cir. 1982). This case was rendered moot when the target of the investigation fled the jurisdiction.

497. Most courts, however, have declined to adopt such a requirement for attorney subpoenas. See, e.g., *In re Grand Jury (Anderson)*, 906 F.2d 1485, 1495-96 (10th Cir. 1990) (holding that the Government needed to show no more than the recipients had sufficient notice and that the material sought was relevant); *United States v. Perry*, 857 F.2d 1346, 1347, 1350, 1351 (9th Cir. 1988) (holding that the potential risks were insufficient to warrant a preliminary showing of need or relevance prior to enforcement of the subpoena); *In re Klein*, 776 F.2d 628, 634 (7th Cir. 1985) (holding that the grand jury may call an attorney as a witness and

rule⁴⁹⁹ that makes it a violation of professional conduct for a prosecutor to serve such a subpoena upon an attorney without obtaining prior judicial approval.⁵⁰⁰ Several states, including Pennsylvania,⁵⁰¹ Rhode Island,⁵⁰²

request documents without making any preliminary showing of need). For a thorough discussion of the problems associated with attorney subpoenas, see Robert B. Ellis, Note, *Attorney Subpoenas: The Dilemma Over A Preliminary Showing Requirement*, 1991 U. ILL. L. REV. 137, 168-70 (1991); Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal For Reform*, 136 U. PA. L. REV. 1783 (1988); Robert N. Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal For Reform*, 23 AM. CRIM. L. REV. 95 (1985); Seymour Glanzer & Paul R. Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 J. CRIM. L. & CRIMINOLOGY 1070 (1984).

498. *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1987), *vacated, opinion withdrawn*, 832 F.2d 664 (1st Cir. 1987) (en banc).

499. MASS. S.J.C.R. 3:08, also known as Prosecutorial Function 15 (PF 15) states: "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury *without prior judicial approval* in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness." (emphasis added). On June 27, 1986, the United States District Court for Massachusetts amended its Local Rules to add PF 15, which became effective on July 1, 1986. *Id.*

500. U.S.D. CT. FOR THE DIST. OF MASS., LOCAL R. 5(d) (4) (B).

501. PA. RULES OF PROFESSIONAL CONDUCT Rule 3.10.

A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

Id.

This rule was adopted by the Supreme Court of Pennsylvania on November 7, 1988 and became effective on November 26, 1988. In *Baylson v. Disciplinary Bd. of Pa.*, 975 F.2d 102, 104 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993), the Third Circuit Court of Appeals held that this rule may not be applied to federal prosecutors because "its adoption as federal law falls outside the rule-making authority of the district courts, and its enforcement as state law violates the Supremacy Clause of the United States Constitution." *Baylson*, 975 F.2d at 104. The Third Circuit made it clear, however, that nothing about "the historic powers and functions of the grand jury alone would prevent the adoption of a federal rule requiring government prosecutors to obtain judicial approval before serving a grand jury subpoena on an attorney." *Id.* at 112. For a critique of this rule, see Andrea F. McKenna, *A Prosecutor's Reconsideration of Rule 3.10*, 53 U. PITT. L. REV. 489 (1992).

502. R.I. SUP. CT. R. 47, R.P.C. 3.8(f) ("The prosecutor in a criminal case shall: . . . not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.").

This rule became effective on November 15, 1988. In *re Almond*, 603 A.2d 1087, 1088 (R.I. 1992). On April 20, 1989, the United States District Court for the District of Rhode Island ordered the incorporation of this rule into the local rules of the District Court. *Id.* In a recent decision, however, the United States District Court for the District of New Hampshire followed the decision in *Baylson* and declared that the federal court's adoption of this local

Tennessee,⁵⁰³ and Virginia⁵⁰⁴ have also formulated rules requiring prosecutors to obtain judicial approval before serving subpoenas on attorneys for evidence about their clients.

In order to require a preliminary showing of probable cause for a grand jury subpoena for blood, the Supreme Court⁵⁰⁵ must amend FRCP 17(c) to add the following provisions:⁵⁰⁶

FOR EXTRACTION OF BLOOD: A subpoena may also command the person to whom it is directed to submit to an extraction and testing of a blood sample. These procedures must be conducted in a safe, medical environment by a trained technician.⁵⁰⁷

rule was invalid because it exceeds the court's rulemaking power and violates the Supremacy Clause of the United States Constitution. *Almond v. United States Dist. Ct. Dist. of R.I.*, 852 F. Supp. 78, 79 (D.N.H. 1994).

503. TENN. CT. C.P.R. 8 D.R. 7-103(C).

It is unprofessional conduct for a prosecutor to subpoena an attorney to the grand jury or to any state or federal administrative body with a similar function without prior judicial approval in circumstances where the prosecutor or such other government attorney seeks to compel the attorney-witness to provide evidence concerning a person who at the time is represented by the attorney-witness.

Id.

504. VA. SUP. CT. R. 3A: 12 (a).

No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena duces tecum is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the circuit court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted *in camera*, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the Commonwealth's attorney for the jurisdiction involved, either on motion of the Commonwealth's attorney or upon request to the Commonwealth's attorney by the foreman of any grand jury.

Id. (emphasis added).

505. 28 U.S.C. § 2072(a) (1988) authorizes the Supreme Court to prescribe rules of practice and procedure for the federal courts.

506. This proposed amendment is based largely on the ABA February 1986 Resolution on Subpoenaing Attorneys Before the Grand Jury, *reprinted in Stern & Hoffman, supra* note 497, at 1852.

507. *Schmerber v. California*, 384 U.S. 757, 771-72 (1966); *see also*, *People v. Ford*, 4 Cal. App. 4th 32, 37-38 (Cal. Ct. App. 1992) (finding that the extraction of blood by a technologist at a jail, rather than by a physician at a hospital, did not violate the Fourth Amendment).

The prosecutor shall not subpoena a blood sample from an individual nor cause such a subpoena to be issued without prior judicial approval.⁵⁰⁸

Prior judicial approval shall be withheld unless the court, in an *ex parte* hearing, finds through sworn testimony or an affidavit⁵⁰⁹ that:

- a. a fair probability exists to believe that the substance sought is evidence of a crime; and
- b. a fair probability exists to believe that the substance will be found on the particular person to be searched;⁵¹⁰ and
- c. the need for this evidence outweighs any risk of harm to the individual.⁵¹¹

The hearing shall be conducted by the judge supervising the grand jury in question. The *ex parte* hearing seeking judicial approval shall be conducted with consideration for the need for the secrecy of grand jury proceedings. After the hearing, the court may order the sealing of the affidavit in support of the subpoena.⁵¹²

The proposed subpoena for extraction of blood would operate as follows: When the Government seeks to obtain a sample of blood from an individual, it would be required to approach the supervising judge of the grand jury to apply for such a subpoena. At this stage, the Government would be required to establish probable cause⁵¹³ through sworn testimony or an affidavit,⁵¹⁴ presented in an *ex parte*,⁵¹⁵ *in camera* proceeding.⁵¹⁶

508. See, e.g., *United States v. Ingram*, 797 F. Supp. 705, 717 (E.D. Ark. 1992) (ruling that a showing of reasonable suspicion must be made to a neutral judge before a hair sample may be taken from a defendant released on bail). The court also stated that, "The requirement of prior judicial approval will best safeguard the individual's privacy interests without placing a significant burden on prosecutors or the court system." *Id.*

509. *United States v. Davenport*, No. 89-5461, 1990 WL 116742, at *6 (4th Cir. July 26, 1990).

510. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

511. *Winston v. Lee*, 470 U.S. 753, 761 (1985).

512. FED. R. CRIM. P. 6(e).

513. See, e.g., *Davis v. Texas*, 831 S. W. 2d 426, 440 (Tex. Ct. App. 1992)

514. See *United States v. Davenport*, No. 89-5461, 1990 W. 116742, at *6 (4th Cir. July 26, 1990) (stating that "a warrant or court order for a blood test must be supported by a sworn affidavit or oath to be valid").

515. See *supra* notes 492-99 and accompanying text.

516. In *United States v. R. Enterprises, Inc.*, the Supreme Court indicated that in response to a recipient's Fed. R. Crim. P. 17(c) Motion To Quash a Subpoena on the grounds that it was unreasonable, the Government initially may disclose the subject matter of the investigation to the court *in camera*. The Court stated that this would serve to protect the "strong governmental interests in maintaining secrecy, preserving investigatory flexibility, and avoiding

Recipients wishing to comply with the subpoena would present themselves to the grand jury for testing by a medical professional. If a recipient wishes to challenge the subpoena, he can file a Motion to Quash pursuant to FRCP 17(c) arguing that under the Reasonableness Clause of the Fourth Amendment⁵¹⁷ or the Due Process Clause⁵¹⁸ of the Fifth Amendment,⁵¹⁹ disclosure of the *ex parte* affidavit and an evidentiary

procedural delays.” *United States v. R. Enters., Inc.*, 498 U.S. 292, 302 (1991).

517. In *Gerstein v. Pugh*, the Court held that the Fourth Amendment does not require the “full panoply of adversary safeguards [of] counsel, confrontation, cross-examination, and compulsory process for witnesses” for the judicial determination of probable cause to detain a person arrested without a warrant.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. . . . That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Gerstein v. Pugh, 420 U.S. 103, 119, 120 (1975) (footnote omitted.)

The Court went on to explain that the Fourth, and not the Fifth, Amendment determines the process that is due a defendant in a criminal case.

Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-credit disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the ‘process that is due’ for seizures of person or property in criminal cases, including the detention of suspects pending trial. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct.

Id. at 125 n.27; *see also* *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (holding that under the Fourth Amendment, a defendant is entitled to challenge the veracity of the affidavit in support of a search warrant).

In *Stone v. Powell*, the Court held that a defendant who has had a “full and fair litigation of a Fourth Amendment claim,” may not seek to address this constitutional issue again in a federal habeas corpus petition. *Stone v. Powell*, 428 U.S. 465, 494 (1976). In order to ensure such litigation, the Government must provide a “procedural mechanism” in which a defendant can raise a Fourth Amendment claim and there must be a meaningful inquiry by the courts into that claim. *United States ex. rel. Bostick v. Peters*, 3 F.3d 1023, 1027 (7th Cir. 1993) (citations omitted).

518. In *United States v. Real Property*, the Court rejected the Government’s argument that because a seizure of property was based on a warrant supported by probable cause, the only constitutional protection afforded the property owner in the forfeiture proceeding emanated from the Fourth Amendment. Instead the Court found that both the Fourth and the Fifth Amendments applied. *United States v. Real Property*, 114 S. Ct. 492, 499-500 (1993).

519. Pursuant to *Mathews v. Eldridge*, the court would have to use a balancing test to determine if disclosure of the *ex parte* affidavit and an evidentiary hearing on the motion were

hearing on the matter are necessary. This determination would be made by the court on a case-by-case basis.⁵²⁰

If the court denied the requests for disclosure and the hearing, it would review the *ex parte* affidavit *in camera* and determine whether probable cause existed in support of the subpoena.⁵²¹ If the court granted the recipient's requests for disclosure and a hearing, it would provide the affidavit to the challenger and order a hearing. The movant could argue that the subpoena was unreasonable because it was not supported by probable cause⁵²² and the risk of harm outweighed the need⁵²³ for the intrusion.⁵²⁴ If the court found that the Government had not sustained its

required. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The court would have to consider the following facts:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

520. *Id.* at 334 ("[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue Process is flexible and calls for such procedural protections as the particular situation demands.") (citations omitted).

521. *See, e.g., In re John Doe*, 13 F.3d 633, 636-37 (2d Cir. 1994) (holding that grand jury targets were not denied due process by being refused access to Government affidavits and by being refused an evidentiary hearing to determine the validity of the "crime-fraud exception" to the attorney-client privilege); *In re Grand Jury (Doe)* No. 91-65139, 1993 U.S. App. LEXIS 1247, at *13-14 (9th Cir. Jan. 15, 1993) (holding that an *ex parte* proceeding to determine the validity of the "crime fraud" exception to the attorney-client privilege did not violate due process); *In re Grand Jury (Hill)*, 786 F.2d 3, 7-8 (1st Cir. 1986) (holding that there was no violation of the right to confrontation when the lower court considered an *ex parte* affidavit *in camera* to decide a motion to quash a grand jury subpoena and a motion for an evidentiary hearing); *United States v. Moore*, 522 F.2d 1068, 1072-73 (9th Cir. 1975) (approving an *in camera* determination that the disclosure of a confidential informant's identity would not enable the defendant to establish the existence of substantial falsehoods in a search warrant affidavit); *People v. Hobbs*, 873 P.2d 1246, 1259 (Cal. 1994) ("[A]ll or any part of a search warrant affidavit may be sealed if necessary to implement the [informant's] privilege and protect the identity of a confidential informant."). The court concluded that when a defendant seeks to quash a warrant for which the supporting affidavit has been sealed, the lower court should conduct an *in camera* hearing to determine whether there are sufficient grounds to maintain the confidentiality of the informant's identity and whether the entire affidavit or any portion of it should remain sealed. *Id.* at 1259-60.

522. *See supra* note 354 and accompanying text.

523. *Winston v. Lee*, 470 U.S. 753, 766 (1985).

524. The recipient of a grand jury subpoena should be permitted to challenge the alleged probable cause supporting the subpoena at this stage because the court has always stressed that unlike a search warrant, a subpoena permits the target to challenge its validity before it is enforced. *See supra* note 139 and accompanying text. Additionally, since the exclusionary rule does not apply to grand jury proceedings, the target should be permitted to challenge the

burden of establishing probable cause and proving that its need for the evidence outweighed the potential risk of harm, then the court would quash the subpoena. If it found that probable cause existed for such a search, the court would enforce the subpoena and order the recipient to comply with the request. Presumably, if the grand jury relies in good faith on this finding by the court and the blood of the recipient is extracted and tested, the recipient will not be able to later argue that no probable cause for the search existed.⁵²⁵

This proposed rule does impose some burdens on the Government. It may consume some time and energy. It would require the Government to set forth facts in an affidavit to persuade a judge that there was a "fair probability that . . . evidence of a crime"⁵²⁶ would be found on this person.

This procedure may also briefly disrupt the efficient proceedings of the grand jury.⁵²⁷ However, if the recipient does not choose to challenge the subpoena, the expenditure of time and resources is minimal. If the recipient does challenge the subpoena, FRCP 17(c) already provides for a hearing on the recipient's Motion to Quash the subpoena.⁵²⁸ This proposed amendment to the rule does not add any additional hearings to the

validity of the subpoena before the search is undertaken and the evidence is presented to the grand jury. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

525. *United States v. Leon*, 468 U.S. 897 (1984); *see also* *Davis v. Texas*, 831 S.W.2d 426, 441 (Tex. Ct. App. 1992) (holding that an affidavit in support of a warrant for blood, hair and sperm samples was so "completely lacking in facts to support a finding of probable cause" that "no reasonable, good-faith reliance by the officers was manifested").

526. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

527. In February 1988, the American Bar Association modified its 1986 resolution regarding attorney subpoenas, by advocating that rather than an *ex parte* proceeding, this hearing should be *adversarial*, with notice to the witness.

BE IT RESOLVED, That a prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney without prior judicial approval after an opportunity for an *adversarial proceeding* in circumstances where evidence obtained as a result of the attorney-client relationship concerning a person who is or was represented by the attorney; and BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court finds, on reasonable notice to the attorney and the client

American Bar Association Resolution On Subpoenaing Attorneys Before The Grand Jury (February 1988), *reprinted in* Stern & Hoffman, *supra* note 497, at 1853-54 (emphasis added). The State of Virginia has adopted a similar rule. *See supra* note 504.

An adversarial hearing at the application stage would be too disruptive and would potentially jeopardize the secrecy of the grand jury proceedings. If the recipient does not wish to challenge the subpoena, there is no need for such an adversarial hearing at the application stage. Additionally, in order to preserve the efficiency and confidentiality of the grand jury, the decision on whether to hold an adversarial hearing as to whether the subpoena is supported by probable cause should be made on a case-by-case basis.

528. FED. R. CRIM. P. 17(c).

process.⁵²⁹ Rather, it merely includes another potential fact for the prosecutor to prove at the already-required hearing. Additionally, the concerns about potential delay are not compelling because the question here is not whether probable cause should be established at all, but whether it should be demanded before the enforcement of the subpoena, rather than before the application for a judicial warrant.

Additionally, there may be concerns that this proposal will compromise the secrecy of the grand jury proceedings. The provision permitting the prosecutor to present probable cause by way of a sworn affidavit through an *ex parte*, *in camera* proceeding⁵³⁰ should alleviate these concerns. Furthermore, allowing the affidavit to be sealed after the judge reviews it should also allay fears about a breach of confidentiality.⁵³¹ The court need only reveal the contents of the *ex parte* affidavit in support of the subpoena after it has balanced the interests of the parties and determined that disclosure is required. To protect against any further disclosures, the court may also decide to seal the transcript of the hearing on the motion to quash.⁵³²

On the other hand, this proposal offers significant benefits that outweigh any of its potential detriments. First, if a showing of probable cause for such a subpoena is not instituted, the grand jury will be prohibited from obtaining such evidence unless the Government seeks and obtains a search warrant for it.⁵³³ A search warrant is more procedurally complex than a grand jury subpoena.⁵³⁴ Unlike a subpoena, a warrant is generally valid for only a short period of time.⁵³⁵ Moreover, a warrant must usually be served during daylight hours by a Government agent.⁵³⁶

A search warrant for a blood sample will require that the Government find the person from whom it seeks to extract blood and seize him for purposes of the testing. This may result in a dangerous confrontation between the witness and the agent or may result in the use of unreasonable force upon the witness.⁵³⁷ After the search is conducted, the Government

529. An adversarial hearing at the application stage is inappropriate. *See supra* note 527.

530. *See supra* text accompanying notes 515-16.

531. FED. R. CRIM. P. 6(e)(6) ("SEALED RECORDS. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.").

532. *Id.*

533. *See also In re Grand Jury* (T.S.), 816 F. Supp. 1196, 1198 (1993) (discussing *Schmerber v. California*, 384 U.S. 757 (1966)).

534. *See* FED. R. CRIM. P. 41(e); *see also Murray v. United States*, 487 U.S. 533, 546 (1988) (Marshall, J., dissenting) ("Obtaining a warrant is inconvenient and time consuming.").

535. FED. R. CRIM. P. 41(e).

536. FED. R. CRIM. P. 41(c)(1).

537. *See, e.g., Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 582 (1991) (finding that Hammer's civil rights were violated when, after he was

must return the warrant along with a written inventory of the items taken.⁵³⁸ The inventory must be made in the presence of the applicant for the warrant and the person from whom the items were taken.⁵³⁹ Thereafter, the magistrate must file the warrant and the inventory with the clerk of the district court.⁵⁴⁰ Second, a preliminary showing of probable cause may result in fewer challenges to the subpoenas. The recipient may realize that the Government has already established probable cause before one judge and that this finding will likely be affirmed by a second one.

The final and most important point is that by making a preliminary showing of probable cause before serving this subpoena, the Government will be adhering to the constitutional requirements of the Fourth Amendment and will be ensuring that the recipient is free from an unreasonable search.

In short, this proposed amendment to the Federal Rules of Criminal Procedure does not compromise the independence, confidentiality, or power of the grand jury proceedings.⁵⁴¹ Instead, it serves to protect the constitutional rights of those who are subpoenaed.⁵⁴² In this way, it provides the grand jury with a valuable alternative, while ensuring that the recipient's Fourth Amendment rights are honored.

VI. Conclusion

Historically, the federal grand jury has exercised expansive power. It has enjoyed tremendous independence and has maintained significant secrecy around its proceedings.

One of its greatest powers has been the ability to subpoena witnesses to provide oral testimony and physical evidence during a criminal investigation. In recent years, it has used this power to subpoena blood samples from individuals. The use of this power, however, must be limited by Constitutional provisions. Invasions into the body constitute a search. The Fourth Amendment prohibits such intrusions without a preliminary showing of probable cause. Either this search must be preceded by a traditional judicial warrant or a subpoena supported by probable cause.

In order to implement this principle, the Court should provide two options. The Government may obtain a probable cause warrant to conduct

arrested for driving under the influence, police officers forcibly withdrew blood from him).

538. FED. R. CRIM. P. 41(d).

539. *Id.*

540. FED. R. CRIM. P. 41(g).

541. *See supra* text accompanying notes 471-76.

542. *See supra* note 477 and accompanying text.

this search or the Federal Rules of Criminal Procedure should be amended to provide that the Government must establish probable cause for the intrusion before it serves such a subpoena. In this way, the Court would preserve the power of the grand jury to obtain such evidence, but would also guarantee that the recipient would be free from an unreasonable search under the Fourth Amendment.